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110
No. 2444

United States
Circuit Court of Appeals

For the Ninth Circuit.

MAX STEINFELDT,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the Northern District of California,
First Division.

Filed

SEP 21 1914

F. D. Monckton,
Clerk.

No. 2444

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For the Ninth Circuit.

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First Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the District Court of the United States, for the
Northern District of California.*

No. 5247.

UNITED STATES OF AMERICA

vs.

MAX STEINFELDT.

Amended Praeceptum for Transcript.

To the Clerk of said Court:

Please make return to the Writ of Error issued by transmitting to the United States Circuit Court of Appeals for the Ninth Circuit true copies of the following, viz:

The Indictment.

Minutes showing arraignment and plea;

Minutes of Trial;

Verdict;

Judgment;

Petition for Writ of Error;

Assignment of Errors;

Writ of Errors;

Order Allowing Writ of Error;

Bill of Exceptions; [1*]

Also transmit original Writ of Error and Original Citation thereon, and certify to above as being the return to the Writ of Error, and also certify that copy of writ of error was lodged with clerk for defendant in error on date of issuance of writ.

*Page-number appearing at foot of page of original certified Record.

Dated at San Francisco, California, this 19th day of June, A. D. 1914.

PHILIP S. EHRLICH,
Attorney for Defendant.

[Endorsed]: Filed Jun. 19, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [2]

Indictment.

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

At a stated term of Court begun and holden at the
City and County of San Francisco, within and
for the State and Northern District of California,
on the first Monday of March in the year of
our Lord one thousand nine hundred and thirteen.

The Grand Jurors of the United States of America,
within and for the District aforesaid, on their
oaths present: That

MAX STEINFELDT,

heretofore, to wit, on the third day of March in the
year of our Lord one thousand nine hundred and
thirteen, at San Francisco, in the State and Northern
District of California then and there being, did
then and there wilfully, fraudulently and knowingly
receive and conceal one five tael can of opium prepared
for smoking purposes, which as he, the said

Max Steinfeldt, then and there knew,
Violation had been, imported into the United
Act of States contrary to law.

Feb. 9, 1909. AGAINST the peace and dignity of

the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

J. L. McNAB,

United States Attorney.

NAMES OF WITNESSES APPEARING BEFORE THE GRAND JURY:

JOHN W. SMITH.

[Endorsed]: A True Bill. James K. Wilson, Foreman Grand Jury. Presented in open court and filed Jun. 20, 1913. W. B. Maling, Clerk. By Francis Krull, Deputy Clerk. [3]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 22d day of September, in the year of our Lord one thousand nine hundred and thirteen. Present: the Honorable M. T. DOOLING, Judge.

No. 5247.

U. S.

vs.

MAX STEINFELDT.

Arraignment and Plea.

The defendant being present in open court with his attorney, said defendant was then and there duly arraigned upon the indictment herein against him, to

which said indictment he then and there pleaded not guilty, which said plea was by the Court ordered entered. [4]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Wednesday, the 1st day of April, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable MAURICE T. DOOLING, District Judge.

No. 5247.

UNITED STATES OF AMERICA

vs.

MAX STEINFELDT.

Minutes of Trial, etc.

In this case, the defendant Max Steinfeldt was present in person with his attorneys, George E. Price and Gilbert D. Boalt, Esqs. John W. Preston, Esq., United States Attorney, appeared on behalf of United States. The Court then ordered that the trial of this case do now proceed, and ordered that the jury-box be filled. Thereupon the following named persons were duly drawn and sworn to try the issues joined in this case, viz.:

| | |
|---------------------|--------------------|
| A. W. Drummond. | George L. Center. |
| Charles M. Belshaw. | J. F. Cunningham. |
| J. H. Taylor. | Alfred P. Hampton. |
| Peter A. Smith. | C. R. Johnson. |
| D. C. Dorsey. | K. H. Plate. |
| Leroy W. Jackson. | J. T. Drennan. |

Mr. Preston stated the case of the Government to the Court and jury, and called Louis H. Voight, Thomas F. Burke, F. G. Menrath, John W. Smith, who were each duly sworn and examined as witnesses on behalf of the United States. Mr. Preston recalled Thomas F. Burke to the stand and introduced in evidence U. S. Exhibit No. 1—one package, containing cards, opium, etc., and a suitcase containing certain opium which was marked U. S. Exhibit “A” for identification, and thereupon rested the case for the Government. Mr. Price then stated the defense of the defendant, and called Max [5] Steinfeldt, the defendant, who was duly sworn and examined, and thereupon the defendant rested his case. The case was then argued by Mr. Preston, Mr. Price and Mr. Boalt, and submitted. The Court then charged the jury, who at 3:30 P. M. retired to deliberate upon a verdict, and subsequently at 4:25 P. M. returned into court, and upon being asked in the presence of the defendant if they had agreed upon a verdict answered in the affirmative, and rendered a written verdict, which was ordered recorded, and which was in the words following: “We, the jury, find Max Steinfeldt, the defendant at the bar, guilty as charged. G. L. Center, foreman.”

The Court then ordered that the jurors in this case be and they are hereby excused from further attendance upon the court, until Friday, April 10, 1914, at 10 A. M. Further ordered that the defendant, Max Steinfeldt, be, and appear in open court on Saturday, April 4th, 1914, for sentence. [6]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

No. 5247.

UNITED STATES OF AMERICA

vs.

MAX STEINFELDT.

Verdict.

We, the jury, find Max Steinfeldt, the defendant at the bar, guilty as charged.

G. L. CENTER,
Foreman.

[Endorsed]: Filed April 1st, 1914, at 4 o'clock and 25 minutes P. M. W. B. Maling, Clerk. Lyle S. Morris, Deputy Clerk. [7]

*In the District Court of the United States, for the
Northern District of California, First Division.*

No. 5247.

Convicted of Receiving and Concealing Opium.

UNITED STATES OF AMERICA

vs.

MAX STEINFELDT.

Judgment on Verdict of Guilty.

John W. Preston, Esq., United States Attorney, and the defendant with G. D. Boalt, Esq., his attorney, came into court. The defendant was duly informed by the Court of the nature of the Indictment

filed on the 20th day of June, 1913, charging him with the crime of receiving and concealing opium; of his arraignment and plea of Not Guilty; of his trial and the verdict of the jury on the 1st day of April, 1914, to wit: "We, the jury, find Max Steinfeldt, the defendant at the bar, guilty as charged."

The defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him, and no sufficient cause being shown to the Court,

AND WHEREAS, the said Max Steinfeldt having been duly convicted in this court of the crime of receiving and concealing opium;

IT IS THEREFORE ORDERED AND ADJUDGED that the said Max Steinfeldt be imprisoned for the term of four months in the Alameda County Jail, Alameda Co., California.

Judgment entered this 9th day of April, 1914.

W. B. MALING,

Clerk.

By C. W. Calbreath,

Deputy Clerk. [8]

*In the District Court of the United States, in and for
the Northern District of California.*

No. 5247.

THE UNITED STATES OF AMERICA

vs.

MAX STEINFELDT.

Petition for Writ of Error.

Your petitioner, the above-named defendant, Max

Steinfeldt, brings this his petition for Writ of Error to the District Court of the United States in and for the Northern District of California, and in that behalf your petitioner shows :

1. That on the 9th day of April, 1914, there was made, given and rendered in the above-entitled cause a judgment against your petitioner, wherein and whereby he was adjudged and sentenced to imprisonment for a term of four months in the Alameda County Jail.

2. Your petitioner shows that he is advised by counsel and he avers that there was and is manifest error in the record and proceedings had in said cause and in the making, giving and rendition and entry of said judgment and sentence to the great injury and damage of your petitioner, all of which errors will be more fully made to appear by an examination of the said record, and by an examination of the bill of exceptions to be tendered and filed, and in the assignment of errors hereinafter set out and to be presented herewith; and to that end thereafter that the said judgment, sentence and proceedings may be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, your petitioner now prays that a Writ of Error may be issued, directed therefrom to the said District Court of the United States for the Northern [9] District of California, returnable according to law and the practice of the court, and that there may be directed to be returned pursuant thereto a true copy of the record, bill of exceptions, assignment of errors and all proceedings had in said cause, and that the same may be removed into the United States Circuit Court of Appeals for the Ninth

Circuit, to the end that the error, if any has happened, may be duly corrected, and full and speedy justice done your petitioner.

And your petitioner makes the assignment of errors presented herewith, upon which he will rely, and which will be made to appear by a return of the said record in obedience to the said Writ.

WHEREFORE, your petitioner prays the issuance of a Writ as herein prayed, and prays that the assignment of errors, presented herewith, may be considered as his assignment of errors upon the Writ, and that the judgment rendered in this cause may be reversed and held for naught, and that said cause be remanded for further proceedings, and that he be awarded a *supersedeas* upon said judgment and all necessary and proper process, including bail.

MAX STEINFELDT,

Petitioner.

PHILIP S. EHRLICH,

Attorney for Defendant.

Due service and receipt of a copy of the within is hereby admitted this 16th day of April, 1914.

JNO. W. PRESTON.

[Endorsed]: Filed Apr. 16, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [10]

*In the District Court of the United States, in and for
the Northern District of California.*

No. 5247.

THE UNITED STATES OF AMERICA

vs.

MAX STEINFELDT.

Assignment of Errors.

Max Steinfeldt, defendant in the above-entitled cause, and plaintiff in error herein, having petitioned for an order from said Court permitting him to procure a Writ of Error to this court, directed from the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment and sentence made and entered in said cause against said Max Steinfeldt, now makes and files with his said petition the following assignment of errors herein, upon which he will apply for a reversal of said judgment and sentence upon the said Writ, and which said errors, and each, and everyone of them, are to the great detriment, injury and prejudice of the said defendant, and in violation of the rights conferred upon him by law; and he says that in the record and proceedings in the above-entitled cause, upon the hearing and determination thereof in the District Court of the United States, for the Northern District of California, there is manifest error in this, to wit:

1. That the Act of February 9th, 1909, Chapter 100, 35 Statutes Large, 614, the second section thereof, given in the words "or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such opium or preparation or derivative thereof after importation, knowing the same to have been imported contrary to law, such opium or preparation or derivative thereof shall be forfeited and shall be destroyed, and [11] the offender shall be fined in any sum not exceeding five thousand dollars nor less than fifty dollars or by im-

prisonment for any time not exceeding two years, or both," is contrary to the Fifth Amendment to the Constitution of the United States, in that it deprives the defendants of life and liberty without due process of law.

2. That the Act of February 9th, 1909, Chapter 100, 35 Statutes Large 614, the second section thereof, given in the words "or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such opium or preparation or derivative thereof after importation, knowing the same to have been imported contrary to law, such opium or preparation or derivative thereof shall be forfeited and shall be destroyed, and the offender shall be fined in any sum not exceeding five thousand dollars, nor less than fifty dollars, or by imprisonment for any time not exceeding two years, or both," is contrary to the Tenth Amendment to the Constitution of the United States, in that it is an assumption by Congress of powers not delegated to the United States by the Constitution.

3. That the Act of February 9th, 1909, Chapter 100, 35 Statutes at Large 614, the second section thereof, given in the words "or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such opium or preparation or derivative thereof after importation, knowing the same to have been imported contrary to law, such opium or preparation or derivative thereof shall be forfeited and shall be destroyed, and the offender shall be fined in any sum not exceeding five thousand dollars nor less than fifty dollars, or by imprisonment

for any time not exceeding two years, or both," is contrary to the Tenth Amendment to the Constitution of the United States, in that it is an assumption [12] by Congress of powers reserved to the States respectively, or to the people.

4. That the second section of the Act of February 9th, 1909, Chapter 100, 35 Stat. L. 614, given in the words, "or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such opium or preparation or derivative thereof after importation, knowing the same to have been imported contrary to law, such opium or preparation or derivative thereof shall be forfeited and shall be destroyed, and the offender shall be fined in any sum not exceeding five thousand dollars, nor less than fifty dollars, or by imprisonment for any time not exceeding two years, or both," has reference to the receiving, concealing, buying, selling, facilitating the transportation and concealment of opium by persons who knowingly and fraudulently import or bring the same into the United States, or assist in so doing; that the indictment does not charge the defendant with having fraudulently or knowingly imported or brought into the United States, or assisted in so doing, any of said opium.

5. That the indictment violates the Sixth Amendment to the Constitution of the United States in that it fails to inform the defendant of the nature of the accusation against him.

6. That the indictment is contrary to Article 1, Section 8 of the Constitution of the United States, in that it does not come within the powers of Congress

enumerated in Section 8, of Article 1, and is not a law necessary or proper to carry into execution such powers.

7. That the said acts charged in the indictment do not constitute a public offense against the laws of the United States.

8. That the indictment fails to show that the court has any jurisdiction over the alleged acts as to subject matter. [13]

9. That the indictment fails to show that the Court has any jurisdiction over the alleged acts as to persons.

10. That the indictment does not state facts sufficient to constitute a public offense against the laws of the United States.

11. That the indictment fails to sufficiently inform the defendant of the nature of the accusation against him.

12. That the verdict was against the evidence.

13. That the indictment is void in that it does not appear how or wherein said alleged importation was contrary to law.

14. That the indictment is void in that it does not appear how or when said importation was made.

15. That the indictment is void in that it does not appear how or wherein said alleged importation was contrary to law, or when said importation was made.

16. The Court erred in sentencing the defendant without his first being adjudged guilty of any crime.

17. The Court erred in pronouncing sentence of

imprisonment against said defendant.

PHILIP S. EHRLICH,

Attorney for Plaintiff in Error and Defendant.

Due service and receipt of a copy of the within is hereby admitted this 16th day of April, 1914.

JNO. W. PRESTON.

[Endorsed]: Filed Apr. 16, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [14]

*In the District Court of the United States, in and for
the Northern District of California.*

No. 5247.

THE UNITED STATES OF AMERICA

vs.

MAX STEINFELDT.

Order Allowing Writ of Error and Supersedeas.

The Writ of Error and the *supersedeas* therein prayed for by defendant Max Steinfeldt, pending the decision upon the writ of error, are hereby allowed, and the defendant is admitted to bail upon the Writ of Error in the sum of Two Thousand (\$2,000.00) Dollars. The bond for costs upon the Writ of Error is hereby fixed at the sum of \$300.00.

Dated at San Francisco, California, this 16th day of April, A. D. 1914.

M. T. DOOLING,

District Judge of the United States for the Northern
District of California.

Due service and receipt of a copy of the within is hereby admitted this 16th day of April, 1914.

JNO. W. PRESTON.

[Endorsed]: Filed Apr. 16, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [15]

Writ of Error (Copy).

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable Judges of the District Court of the United States, for the Northern District of California, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said District Court, before you between Max Steinfeldt, plaintiff in error, and the United States of America, defendant in error, a manifest error hath happened, to the great damage of the said Max Steinfeldt, plaintiff in error, as by his complainant appears, and it being fit, that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to

be there and then held, that the record and proceedings aforesaid be inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 18th day of April, in the year of our Lord one thousand nine hundred and fourteen and of the Independence of the United States the one hundred and thirty-eight. [16]

The above writ of error is hereby allowed.

WM. W. MORROW,

Judge of the Circuit Court of Appeals.

Service of the within Writ of Error admitted this
— day of April, 1914.

WALTER E. HETTMAN,

Asst. U. S. District Attorney.

[Endorsed]: Filed Apr. 18, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [17]

Citation on Writ of Error (Copy).

UNITED STATES OF AMERICA,—ss.

The President of the United States, to The United States of America, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of

error duly issued and now on file in the Clerk's Office of the United States District Court for the Northern District of California, wherein Max Steinfeldt is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable M. T. DOOLING,
United States District Judge for the Northern District of California, this 9th day of June, A. D. 1914.

M. T. DOOLING,
United States District Judge.

Due service of the within Citation admitted this 10th day of June, 1914.

WALTER E. HETTMAN,
Asst. U. S. Atty.

[Endorsed]: Filed Jun. 10, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [18]

*In the District Court of the United States, in and
for the Northern District of California.*

No. 5247.

THE UNITED STATES OF AMERICA

vs.

MAX STEINFELDT,

Defendant.

Bill of Exceptions.

BE IT REMEMBERED, that heretofore, the

Grand Jury of the United States, in and for the Northern District of California, did find and return in, to and before the above-entitled Court its Indictment against the defendant Max Steinfeldt, and thereafter the said Max Steinfeldt appeared in court, and upon being called to plead to said Indictment, duly pleaded not guilty, as shown by the record herein, and the cause being at issue, the same came on for trial, before the Honorable M. T. Dooling, District Judge, and a jury duly impaneled, the United States being represented by Worth E. Hettman, Esq., and the defendant being represented by George E. Price, Esq., and Gilbert D. Boalt, Esq., the following proceedings were had:

[Testimony of Louis H. Voyght, for the Government.]

LOUIS H. VOYGHT, called as witness for the United States, being duly sworn, testified:

Q. And you were manager in the month of March, 1913? A. Yes, sir. [19]

Q. Do you know the defendant Mr. Steinfeldt?

A. Yes, sir.

Q. How long had he been rooming at your place prior to March 3d?

A. Since the 22d of February.

Q. Who was living there with him?

A. His wife.

Q. I will ask you if anyone came to see him there at unusual hours. A. They did.

Q At what times, for instance?

(Testimony of Louis H. Voyght.)

A. During the night and daytime, at all times.

* * * * *

Mr. HETTMAN.—Very well. On some day prior to March 3d did you hear a conversation over the telephone between Mr. Steinfeldt and another man?

A. I did.

Mr. PRICE.—We object to that unless it is shown the witness knows who the parties were talking.

The COURT.—It is not essential he should know anybody except the defendant.

Mr. HETTMAN.—I wish to show it is in regard to an opium transaction.

The COURT.—He says he heard the conversation. The objection is overruled.

Mr. HETTMAN.—Q. Relate this conversation between the party and the defendant.

Mr. PRICE.—We object to that unless he testifies he knew the defendant's voice.

Mr. HETTMAN.—Q. You had heard the defendant's voice [20] before over the telephone?

A. Yes.

Q. Did they call him by name?

A. They called for Apartment 10.

Mr. HETTMAN.—Q. Did the party call for Mr. Steinfeldt?

Mr. PRICE.—We object to that as being a conversation having taken place not in the presence of the defendant.

The COURT.—The objection is overruled.

Q. I understand you know the defendant's voice?

A. Yes, sir, I do.

(Testimony of Louis H. Voyght.)

Q. They called up the apartment in which the defendant lived? A. Yes, sir.

Q. In response to that call somebody answered?

A. Yes, sir.

Q. And it was the voice of the defendant?

A. I am sure it was the voice of the defendant.

The COURT.—The objection is overruled.

Mr. HETTMAN.—Q. Relate the conversation as near as you can remember it of what took place and what was said.

A. As near as I can remember the party that called up asked for Apartment 10, Mr. Steinfeldt; I cannot quite—

Mr. HETTMAN.—Q. He asked for Mr. Steinfeldt?

A. He asked for Apartment 10. I want to get exactly the words if I can. He wanted to know if he had something. That is why I listened to his conversation—

Mr. HETTMAN.—(Interrupting.) Never mind that. Relate the conversation.

A. He says, "I have some of the black stuff, some coke and some snow," and after that I notified the police department, [21] Mr. Burke.

Q. He said, "Have you got some"—

A. That is the first word, have you got anything.

Q. Black stuff, and the second term is what?

A. Coke, from what I could understand.

Q. And snow? A. Yes, sir.

* * * * *

Q. On the 3d day of March did Mr. Steinfeldt

(Testimony of Louis H. Voyght.)

come to you and leave with you a package?

A. He and another gentleman came down the stairs towards the elevator; I don't know whether they came from the elevator or down the stairs; they left the package at the office.

Q. At the desk?

A. Yes, sir, along the counter there, with the instructions to keep the package up, don't upset it. Officer Burke did not come on Sunday, the day I telephoned to him.

Q. He left this package with the instructions to keep it up. Did he give any other instructions?

A. He said, "Somebody will call for the package; give this package to the party who may call."

Q. About what time in the afternoon was that?

A. About 2:30 or 3 o'clock; something like that. One o'clock or 2 o'clock, something around there.

Q. Was there any direction on the outside of the wrapper?

A. Mr. Steinfeldt's name was on it.

Q. I will show you the wrapping paper first and ask you if you can identify the writing in any way.

A. It resembles it. [22]

Q. What time did Mr. Steinfeldt return?

A. It must have been about 4 o'clock; 3 or 4 o'clock; it might have been later; it might have been 5 o'clock; I am not quite sure what time he returned.

* * * * *

Mr. HETTMAN.—Q. When Mr. Steinfeldt returned did he ask for the package?

(Testimony of Louis H. Voyght.)

A. He asked me whether somebody had gotten the package, and I said no. He says, "I will take it up-stairs."

Q. Was there any conversation in regard to anybody inquiring for the package?

A. How do you mean?

Q. Did you have any conversation in regard to anyone coming there inquiring for the package?

A. He asked me if somebody had gotten the package.

Q. What did you say?

A. I said, "No"; I said, "A man came in here, but he did not ask for any package." Mr. Steinfeldt asked for the package and says, "I will take it up-stairs."

Q. Was Mr. Burke there at the time?

A. Mr. Burke was sitting in the lobby.

Q. Had you seen the contents of the package prior to Mr. Steinfeldt's return before he returned?

A. Yes, sir.

Q. You had opened the package there with Mr. Burke? A. Officer Burke opened it.

Q. I will ask you if you can identify any of these articles in this package,—anything similar to that?

A. Yes, sir.

Q. Also the cans? [23]

A. Yes, sir, the contents.

Q. And can you identify any of these things in the envelope? A. I have not looked in the envelope.

Q. To your knowledge that is the contents of the package? A. Yes, sir.

(Testimony of Louis H. Voyght.)

Q. Envelope and playing-cards folded in this manner? A. Yes, sir.

Q. What did Officer Burke do?

A. He walked up the stairs after him and arrested him.

Q. Had anyone come in the building with Mr. Steinfeldt?

A. I think his wife came in and went up in the elevator. I think his wife and the other gentleman; there had been somebody with him.

Q. And Mr. Steinfeldt was about halfway up the stairs then? A. Yes, sir.

Q. When you handed him the package did he say anything in reply to it?

A. He simply asked me if anyone had called for it; I said no; he says, "I will take it up-stairs."

Mr. HETTMAN.—That is all.

* * * * * * * *

Cross-examination.

Q. You have been talking about a package having been left; do you remember what day of the week that was? A. On Monday, the 3d day of March.

Q. Just about what time of the day was that?

A. I am almost sure it was between the hour of 2, 3—1, 2 or 3 o'clock. [24]

Q. Mr. Steinfeldt came down the elevator that morning, did he not?

A. I don't know if he came down the elevator or not.

Q. He came out in the office?

A. Yes, sir, he came to the desk.

(Testimony of Louis H. Voyght.)

Q. His wife was with him, was she not?

A. I saw another gentleman with him, I am quite sure.

* * * * *

Q. You telephoned? A. Yes, sir.

Q. And Officer Burke came down in response to your telephone message?

A. Not immediately; I telephoned on Sunday and he came on Monday.

Q. And he came there and sat down?

A. Yes, sir.

Q. And you gave him the newspaper?

A. I did.

Q. And you told him that Steinfeldt would be back about what time?

A. I says somebody was to call for this package left by Steinfeldt.

Q. And did that party call for it? A. No, sir.

Q. When Mr. Steinfeldt came in you gave him that package, did you not?

A. Because Mr. Steinfeldt asked for it.

* * * * *

Q. Whereabouts did you have this package?

A. On top of the telephone exchange switch there.

[25]

Q. That is facing McAllister Street?

A. It faces the lobby—

Q. (Interrupting.) It faces McAllister Street, does it not? A. I think it does.

Q. You have a counter around the place?

A. Glass around it.

(Testimony of Louis H. Voyght.)

Q. You put it on top of the telephone exchange?

A. I do not know whether I put it there; it was put there when it was left; I think my clerk put it there perhaps.

Q. What did you do with it when it was given to you?

A. This man who was Mr. Steinfeldt left instructions to leave this package—

Q. (Interrupting.) I am asking you what you did with it when it was given to you?

A. My man put it there.

Q. Was this package turned over to you by Mr. Steinfeldt or anybody else?

A. It was turned over by Mr. Steinfeldt to the office.

Q. Was it turned over to you?

A. I am not sure.

Q. I want to be sure about it.

* * * * *

Mr. PRICE.—Q. You do not remember anybody turning a package of this sort which you have identified here over to you?

A. It was turned over in my presence to myself or the clerk; I am not sure.

Q. Did you open it at that time? A. No, sir.

Q. Who turned it over to Mr. Steinfeldt? [26]

A. I gave it to him.

[Testimony of Thomas F. Burke, for the Government.]

THOMAS F. BURKE, called as witness for the United States, being duly sworn, testified:

Q. Do you know the defendant Steinfeldt?

(Testimony of Thomas F. Burke.)

A. Yes, sir.

Q. Will you relate the circumstances under which you went to the Argyle Apartments in the course of your duty and what you did there on the 3d day of March?

A. Yes, sir. There was a note left for me at police headquarters for me to go to the Argyle Apartments, No. 146 McAllister Street; I went there in the afternoon of March 3d last year, 1913, and there I met the Manager who has just testified.

Q. While there did you see a package—was a package shown you? A. Yes, sir.

Q. Did you open it? A. I did.

Q. About what time in the afternoon did you arrive?

A. I went there in the neighborhood of 4 o'clock.

Q. I will show you the contents of the package and ask you if you can identify these.

* * * * *

Q. In your experience as a police officer that would be what in its outward appearance?

A. It was opium when I seen it.

* * * * *

Mr. HETTMAN.—We offer the entire package in evidence.

(The package is marked "U. S. Exhibit 1.")

Q. What did you do with the package after you had [27] examined it there with Mr. Voyght?

A. Mr. Voyght had placed it back on top of the telephone switch-board.

Q. And you remained there then?

Testimony of Thomas F. Burke.)

A. Quite a while.

Q. How long?

A. In the neighborhood of two hours.

Q. Did you see Mr. Steinfeldt come in when he returned? A. I seen him going up-stairs.

Q. Was anyone with him?

A. Not when I seen him, no, sir.

Q. Did you see him get the package from the desk?

A. I did not see him when he took the package, no, sir; I was not looking that way; I was facing a different direction, sideways to him when he came in.

Q. And you arrested him after he had the can?

A. He carried the package in his hand up the stairs when I approached him.

Q. What did you say to him?

A. I asked him what he had in the package. His answer was, "I suppose you know"; we opened the package and this was the contents of it.

Q. Any further conversation in regard to this package?

A. I asked him how it came in his possession; he claimed it belonged to somebody else. I went at that time up to his room and found nothing more in his room. I placed him under arrest.

* * * * * * * *

Cross-examination.

Q. Did you see anyone turn this package over to Mr. [28] Steinfeldt? A. No, sir.

Q. You did not? A. I did not.

* * * * * * * *

(Testimony of Thomas F. Burke.)

Recross-examination.

The COURT.—Have you had experience with opium?

A. I served in the neighborhood of 34 months in the Chinatown gambling squad, and I had lots of experience.

Q. What kind of opium is that?

A. It would be hard for me to state, the exact grade. It is unstamped opium.

Q. Is it smoking opium? A. Yes, sir.

[Testimony of F. S. Memrath, for the Government.]

F. S. MEMRATH, called as a witness for the United States, being duly sworn, testified:

Mr. HETTMAN.—Q. Do you know the defendant, Steinfeldt? A. I do.

Q. How long have you known him?

A. About 13 months.

Q. Did you ever have any dealings with opium, yourself? A. With Steinfeldt?

Q. Yes. A. Yes, sir.

Q. And you served time yourself for an offense committed of handling opium? A. I did.

Q. How long ago was it that you had any opium transaction with Mr. Steinfeldt? What date was it? [29] A. About February, last.

Q. 1913? A. Yes, sir.

Q. What was that transaction that you had with Mr. Steinfeldt? A. I sold opium to him.

Q. You did? A. Yes, sir.

Q. How many cans? A. Four.

Q. Were you paid for it?

(Testimony of F. S. Memrath.)

A. I was paid part of it.

Q. How much? A. \$50.

Q. How much more were you to get?

A. The agreement was \$15 a can.

Q. He paid you \$15 a can?

A. He did not; he paid me \$50 altogether.

Q. Where was it, what place?

A. Marshall hotel.

Q. What street?

A. Market street, San Francisco.

Q. That was about a month prior to this offense here. Did he ever pay you since that time?

A. No, sir.

Q. I will show you this can of opium and ask you if that was the kind of opium or the brand in which you were operating. A. Yes, sir.

Q. I will ask you if you can identify this suitcase.
[30] A. I do.

Q. Is that your suitcase, the one used in your trial?

A. Yes, sir.

Q. I will ask you if that was the brand of opium you were using. A. Yes, sir.

Q. You sold him, then, four cans of opium, about the 20th or 21st of February? A. Yes, sir.

Q. Of this same brand? A. Yes, sir.

Q. And this is your brand of opium in this suitcase? A. Yes, sir.

Q. And an exhibit used in your case?

A. Yes, sir.

* * * * * * * *

(Testimony of F. S. Memrath.)

Cross-examination.

Q. And after you arrived in Oakland, you had this opium you wanted to sell Mr. Steinfeldt?

A. Yes, sir; I had nine cans.

Q. Did you sell any opium to Mr. Steinfeldt?

A. I did.

Q. How much? A. Four cans.

Q. How much did you receive for it? A. \$50.

Q. For the four cans? A. Yes, sir.

Q. Where did you get those four cans of opium?

A. They were my own. [31]

Q. Where did you get them? A. Mexico.

Q. How much did you pay for them in Mexico?

A. I did not pay anything; the man who was connected with me paid the money for it.

* * * * *

Q. And you sold those four cans to Mr. Steinfeldt for \$50? A. Yes, sir; \$50.

Q. As a matter of fact—

A JUROR.—(Interrupting.) Was it gold, or Mexican money, \$17.25?

A. Gold.

Mr. PRICE.—Q. What date, if you remember, did you sell this opium to Mr. Steinfeldt?

A. I am not quite sure, but I think it was the 23d of February; I am not quite sure.

[Testimony of John W. Smith, for the Government.]

JOHN W. SMITH, called as a witness for the United States, being duly sworn, testified:

Mr. HETTMAN.—Q. I will ask you if that is smoking opium. A. Yes, sir.

(Testimony of John W. Smith.)

Q. I will ask you if it is stamped in any way by any government stamp showing it came in according to any law of the United States prior to the year 1909.

Mr. PRICE.—Objected to as calling for the conclusion of the witness.

The COURT.—The objection is overruled.

A. It did not legally come into the United States; [32] it is not legally imported into the United States.

Mr. HETTMAN.—Q. If that had been brought in prior to the year 1909, it would be marked in what way? A. With a customs stamp all around it.

Q. Prior to 1909, opium could be brought into the United States for medicinal purposes?

A. It can now, for medicinal purposes.

Q. For smoking purposes?

A. It could be imported prior to 1909; at that time it was stamped with a stamp going clear around it, with the stamp cancelled; they did that so the stamp could not be removed.

Q. If that was brought in prior to 1909, it would be stamped with a Government stamp?

A. Yes, sir.

Q. That, apparently, had no stamp?

A. I just—

* * * * *

A. To the best of my knowledge, it is smuggled opium.

[Testimony of Max Steinfeldt, in His Own Behalf.]

MAX STEINFELDT, the defendant, being duly sworn, testified:

Mr. BOALT.—Q. Mr. Steinfeldt, on March 3, 1913, where did you reside?

A. At the Argyle Apartments.

Q. Who was residing there with you?

A. My wife and I.

Q. On that date, did you and your wife leave the hotel? A. You mean together?

Q. Yes. A. Yes, sir. [33]

Q. What time?

A. In the afternoon, in the neighborhood of about 2 o'clock.

Q. At that time, did you come down into the lobby of the hotel? A. Yes, sir.

Q. And you entered the lobby just prior to your leaving the hotel, did you? A. Yes, sir.

Q. At that time, did you meet anyone in the lobby of the hotel? A. Yes, sir.

Q. Who?

A. A friend of mine that I had not seen for quite a long while, named Andrews, came in and met me right there in front of the office.

Q. Did you have a conversation with him?

A. Yes, sir.

Q. In regard to what?

A. I asked him to join us. I was taking my wife out to the beach; she had not been well, and I asked him to join us, and he agreed to go with us. He had a package in his hand, and he says, "Leave this in

(Testimony of Max Steinfeldt.)

your room until we come back." I says, "Leave it right here in the office, in case I am not here, and you can get it at any time." I says, "I will mark my name on it, and it will be safe here."

Q. Did you put your name on the envelope?

A. Yes, sir.

Q. Did you observe the paper that was offered in evidence this morning? A. Yes, sir. [34]

Q. You wrote on that paper? A. Yes, sir.

Q. What was done with the package?

A. I handed it to the manager at the desk and asked him to kindly take care of it, that this gentleman would call for it later this evening. "If anybody calls for me, tell them I will be back around 5 or 6 o'clock."

Q. Did you leave the hotel?

A. Yes, sir; 4 or 5 of us went out together.

Q. What time did you return to the hotel that afternoon?

A. In the neighborhood between 6 and 7 o'clock.

Q. At the time that package was given to you by this man, Andrews, did he tell you what was in the package? A. No, sir.

Q. Did you know what was in the package?

A. No, sir.

Q. You say you returned to your hotel about 6 o'clock? A. Yes, sir.

Q. What did you do upon entering the hotel?

A. We came in the back door, because the car we took left us off at the corner at the back entrance.

Q. When you say "we," who do you refer to?

(Testimony of Max Steinfeldt.)

A. My wife and I; we very seldom take the elevator, because we live on the first floor, and she started to walk up-stairs. I stepped over to the counter and started to ask the manager if anybody called for me, and he said "No." At the same time I started to go, and he handed me the package, and I immediately noticed the package was opened; it was not tight the way we left it. I said, "I will take it up-stairs and leave it in my room." [35]

Q. Did the man tell you what was in the package?

A. No, sir.

Q. Did you at any time, from the time you first saw the package in the possession of Andrews in the hotel on March 3d, up to the time it was handed to you by the clerk, know what was in the package?

A. No, sir.

Q. Where is your wife at the present time?

A. She has been sick for the last three years, off and on most of the time.

Cross-examination.

Mr. HETTMAN.—Q. Mr. Steinfeldt, when you came down the stairs on the 3d day of March, is it not a fact that this man, Andrews, came down the stairs with you? A. No, sir.

Q. Where did you meet him?

A. In the middle of the lobby, right in front of the office.

Q. Just what place in the office?

A. Right in the middle.

Q. Near the desk?

A. Right even with the desk, only I should say 18

(Testimony of Max Steinfeldt.)

feet to the center of the lobby.

Q. What greeting did he make, did he say anything to you? What did he say to you?

A. Just shook hands with me, and I said we were just going out to the beach, and asked him to take a ride out with us.

Q. Then what did he do with regard to this package?

A. He says, "All right, I will go." He says, "Leave this in your room until we come back." I says, "Are you going to [36] call for it to-day?" He says, "Yes." I says, "I will leave it right here in the office, and if I am not here you can get it." He says, "All right." I said, "I will put my name on it," and I put my name on it and handed it to the manager, and said, "This gentleman will call for the package this evening."

Q. Had this man, Andrews, been at the hotel before? A. No, sir; he just came to town.

Q. He was going to bring this package there to you? A. No, sir; he was going to call for it.

Q. He was going out with you?

A. Yes, sir, he was going out to the beach, and he said he did not want to take it with him.

Q. You put your name on the package?

A. Yes, sir.

Q. You had the package in your hand, how long?

A. Just long enough to write my name on it and walk to the desk.

Q. Did you examine the package carefully?

A. Not closely.

(Testimony of Max Steinfeldt.)

Q. Yet, when you came back immediately, you noticed the package was open?

A. I could tell, the package was all sticking out, it was not wrapped tight.

Q. You could see to the minutest detail somebody had opened the package?

A. I had my name on it; I could see it had been opened.

Q. Is it not a fact you had the package in your hand going up the stairs when you were arrested?

A. This is after we came back?

Q. You had the package in your hand? [37]

A. Yes, sir.

Q. Is it not a fact that you had a great many telephone calls coming in all hours of the night?

* * * * *

Mr. HETTMAN.—I will ask you about one particular telephone call. Q. Is it not a fact that on a certain night a man called you up and asked you if you had anything? And you said, “I have got some of the black stuff and some coke, and I have got some snow?”

* * * * *

Mr. HETTMAN.—Q. What did you mean by “snow” or “black stuff”?

A. No single message ever came to me in regard to anything like that that I ever answered.

* * * * *

Q. Did you ever hear “opium” called black stuff?

* * * * *

(Testimony of Max Steinfeldt.)

A. No, sir.

* * * * *

Q. (Mr. HETTMAN.) Is it not a fact that you purchased from Memrath some five cans of opium, and only paid him a portion of the purchase price on it?

Mr. BOALT.—Objected to as incompetent, irrelevant, immaterial and not proper cross-examination.

The COURT.—As to whether he paid for it or not is immaterial; whether he bought it or not is all right. Sustained as to the first part and overruled as to the latter.

A. No, sir.

Mr. HETTMAN.—Q. Four cans?

A. No, sir. [38]

Q. Did you ever buy any opium at all?

A. No, sir.

Q. Did you ever see this brand of opium?

A. I could not swear to it.

* * * * *

Mr. HETTMAN.—Q. Did you ever answer any telephone call, or did you pay any regard to any telephone call that anyone asked of you for coke, black stuff or snow?

* * * * *

A. No, sir.

Mr. HETTMAN.—Q. Did you ever comply with any telephone call and deliver any little packages of cocaine called “coke,” “snow” or “black stuff”?

* * * * *

A. No, sir.

(Testimony of Max Steinfeldt.)

Mr. HETTMAN.—Q. Did you ever go to the cigar store at McAllister and Jones and deliver it to anybody?

* * * * *

A. I do not know of any cigar store in that neighborhood, no, sir.

* * * * *

Mr. BOALT.—Q. Mr. Steinfeldt, at the time you returned to the hotel on the afternoon of March 3d, 1913, did you go to the desk and ask for this package?

A. No, sir.

Q. Just state to the jury what happened.

A. I came in and walked over to the desk, because I expected Doctor Gleton, and I asked if there had been any calls, and the manager said “No,” and at the *same reached* behind and got this package and handed it to me. [39]

Q. Without your asking for the package?

A. I did not. I said, “The party has not come yet.” He said, “He has not.” I took the package and took it upstairs there.

Mr. HETTMAN.—Q. Is it not a fact that Mr. Voyght said to you, “There has been a man here four times asking for you,” but he did not give him the package, because he did not say anything about the package. He said, “The man has been here four times asking for you.”

* * * * *

A. He could not have been there four times, because we had just left him at the corner, and he says, “I will be up about 8 or 9 o’clock.”

The foregoing contains all the testimony and evidence, both oral and documentary, and a full statement of the proceedings in the case. At the close of the argument of the respective counsel the Court charged the jury. After the jury had returned a verdict the Court set the 9th day of April, 1914, as the day of sentence.

The defendant, Max Steinfeldt, hereby presents the foregoing as his bill of exceptions herein, and respectfully asks that the same be allowed, signed and sealed and made a part of the record in the case.

PHILIP S. EHRLICH,

Attorney for Defendant.

Dated this 24 day of April, A. D. 1914. [40]

*In the District Court of the United States, in and for
the Northern District of California.*

No. 5247.

THE UNITED STATES OF AMERICA

vs.

MAX STEINFELDT,

Defendant.

Notice of Presentation of Bill of Exceptions.

To John W. Preston, Esq., United States Attorney,
Northern District of California, and to Worth
E. Hettman, Esq., Assistant United States At-
torney:

You will please take notice that the foregoing constitutes and is the proposed Bill of Exceptions of the defendant Max Steinfeldt, in the above-entitled

cause, and the said defendant will apply to the said Court to allow said Bill of Exceptions and to sign and seal the same as the Bill of Exceptions herein.

PHILIP S. EHRLICH,
Attorney for Defendant. [41]

*In the District Court of the United States, in and for
the Northern District of California.*

No. 5247.

THE UNITED STATES OF AMERICA

vs.

MAX STEINFELDT,

Defendant.

Stipulation In Re Bill of Exceptions.

IT IS HEREBY STIPULATED AND AGREED that the foregoing Bill of Exceptions is correct and that the same may be signed, settled, allowed and sealed by the Court.

JOHN W. PRESTON,
United States Attorney,
WALTER E. HETTMAN,
Assistant United States Attorney,
Attorneys for the United States.
PHILIP S. EHRLICH,
Attorney for the Defendant. [42]

*In the District Court of the United States, in and for
the Northern District of California.*

No. 5247.

THE UNITED STATES OF AMERICA

vs.

MAX STEINFELDT,

Defendant.

Order Making Bill of Exceptions Part of the Record.

This Bill of Exceptions having been duly presented to the Court within the time allowed by law and the rules of the Court and within the time extended by Order of the Court duly and regularly made, is now signed, sealed and made a part of the Records in the case, and is allowed as correct.

M. T. DOOLING,

Judge of the District Court of the United States,
Northern District of California.

Dated at San Francisco, California, this 9 day of
June, A. D. 1914. [43]

Due service and receipt of a copy of the within
Notice of presentation of Bill of Exceptions, is
hereby admitted this 21st day of April, 1914.

WALTER E. HETTMAN,

Asst. U. S. Atty.

Due service and receipt of a copy of within order
of Judge setting Bill of Exceptions.

WALTER E. HETTMAN,

Asst. U. S. Atty.

[Endorsed]: Filed Jun. 9, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [44]

*In the District Court of the United States, for the
Northern District of California.*

No. 5247.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MAX STEINFELDT,

Defendant.

Stipulation as to Exhibits.

IT IS HEREBY STIPULATED AND AGREED that the clerk of the above-named court need not transmit a certified copy or any copy of the original exhibits or the exhibits themselves in the above-entitled cause to the United States Circuit Court of Appeals for the Ninth Circuit, but that if necessary the original exhibits may be referred to and obtained from the clerk at the argument before the Circuit Court.

Dated at San Francisco, California, this 9 day of June, A. D. 1914.

P. S. EHRLICH,

Attorney for Defendant.

WALTER E. HETTMAN,

Asst. U. S. Attorney.

[Endorsed]: Filed Jun. 9, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [45]

*In the District Court of the United States, in and for
the Northern District of California.*

No. 5247.

THE UNITED STATES OF AMERICA

vs.

MAX STEINFELDT,

Defendant.

**Stipulation Extending Time in Which to Prepare
and Serve Proposed Bill of Exceptions.**

IT IS HEREBY STIPULATED AND AGREED
that the defendant above named may have to and
including the ninth day of May, 1914, in which to
prepare and serve his proposed Bill of Exceptions
in said cause.

Dated at San Francisco, California, this 14th day
of April, A. D. 1914.

WALTER E. HETTMAN,

Asst. United States Attorney.

PHILIP S. EHRLICH,

Attorney for Defendant.

IT IS SO ORDERED.

Dated at San Francisco, California, this 14th day
of April, A. D. 1914.

Judge.

[Endorsed]: Filed Apr. 15, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [46]

*In the District Court of the United States, in and for
the Northern District of California.*

No. 5247.

THE UNITED STATES OF AMERICA

VS.

MAX STEINFELDT,

Defendant.

**Stipulation Extending Time for U. S. to Propose
Amendments to Bill of Exceptions.**

IT IS HEREBY STIPULATED that the United States of America may have to and including the first day of June, 1914, in which to propose amendments to defendant's Bill of Exceptions.

Dated San Francisco, Cal., this 8th day of May, 1914.

JNO. W. PRESTON.

P. S. EHRLICH.

[Endorsed]: Filed May 8, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [47]

*In the District Court of the United States, in and for
the Northern District of California.*

No. 5247.

THE UNITED STATES OF AMERICA

VS.

MAX STEINFELDT,

Defendant.

**Stipulation and Order Extending Time for U. S. to
Propose Amendments to Bill of Exceptions.**

IT IS HEREBY STIPULATED AND AGREED
that the United States of America in the above-en-
titled action may have to and including the 20th day
of June, 1914, in which to propose amendments to
defendant's proposed Bill of Exceptions herein.

P. S. EHRLICH,

WALTER E. HETTMAN,

Asst. U. S. Atty.

IT IS SO ORDERED.

M. T. DOOLING,

Judge of the District Court.

[Endorsed]: Filed Jun. 1, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [48]

**Certificate of Clerk U. S. District Court to Transcript
of Appeal.**

I, W. B. Maling, Clerk of the District Court of the
United States of America for the Northern District
of California, do hereby certify that the foregoing
48 pages, numbered from 1 to 48, inclusive, contain a
full, true and correct Transcript of certain records
and proceedings, in the case of the United States of
America vs. Max Steinfeldt, numbered 5247, as the
same now remain on file and of record in the Clerk's
office of said District Court; said Transcript having
been prepared pursuant to and in accordance with
the "Amended Praeceptum for Transcript" (copy of
which is embodied in this Transcript), and the in-

structions of Philip S. Ehrlich, Esquire, attorney for plaintiff in error herein.

I further certify that the costs of preparing and certifying the foregoing Transcript on Writ of Error is the sum of Twenty-seven Dollars (\$27.00), and that the same has been paid to me by the attorney for the plaintiff in error.

Annexed hereto is the Original Writ of Error (pages 50 and 51), with the return of the said District Court to said Writ of Error attached thereto (page 52), and the Original Citation on Writ of Error (pages 53 and 54).

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 29th day of June, A. D. 1914.

[Seal]

W. B. MALING,
Clerk.

By Lyle S. Morris,
Deputy Clerk. [49]

Writ of Error (Original).

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable Judges of the District Court of the United States, for the Northern District of California, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said District Court, before you, between Max Steinfeldt, plaintiff in error, and the United States of America, defendant in error, a manifest error

hath happened, to the great damage of the said Max Steinfeldt, plaintiff in error, as by his complaint appears, and it being fit, that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be there and then held, that the record and proceedings aforesaid be inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 18th day of April, in the year of our Lord one thousand nine hundred and fourteen and of the Independence of the United States the one hundred and thirty-eight.

The above writ of error is hereby allowed.

WM. W. MORROW,

Judge of the Circuit Court of Appeals. [50]

Service of the within Writ of Error admitted this
— of April, 1914.

WALTER E. HETTMAN,
Asst. U. S. District Attorney.

[Endorsed]: No. 5247. United States District Court, Northern Division of California. United States of America vs. Max Steinfeldt. Writ of Error. Filed Apr. 18, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [51]

Return to Writ of Error.

The Answer of the Judges of the District Court of the United States of America, for the Northern District of California, to the within Writ of Error.

As within we are commanded, we certify under the seal of our said District Court, in a certain schedule to this Writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, within mentioned, at the day and place within contained.

We further certify that a copy of this Writ was on the 10th day of June, A. D. 1914, duly lodged in the case in this court for the within named defendant in error.

By the Court:

[Seal]

W. B. MALING,
Clerk United States District Court, Northern District of California.

By Lyle S. Morris,
Deputy Clerk. [52]

Citation on Writ of Error (Original).

UNITED STATES OF AMERICA,—ss.

The President of the United States, to the United States of America, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the Clerk's Office of the United States District Court for the Northern District of California wherein Max Steinfeldt is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable M. T. DOOLING, United States District Judge for the Northern District of California, this 9th day of June, A. D. 1914.

M. T. DOOLING,

United States District Judge. [53]

Due service of the within Citation admitted this 10th day of June, 1914.

WALTER E. HETTMAN,

Asst. U. S. Atty.

[Endorsed]: No. 5247. U. S. Circuit Court of Appeals for the Ninth Circuit. Max Steinfeldt, Plaintiff in Error, vs. United States of America, De-

fendant in Error. Citation on Writ of Error. Filed Jun. 10, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [54]

[Endorsed]: No. 2444. United States Circuit Court of Appeals for the Ninth Circuit. Max Steinfeldt, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Northern District of California, First Division.

Received July 7, 1914.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

Filed July 8, 1914.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

2
No. 2444.

IN THE
United States Circuit Court of Appeals
NINTH CIRCUIT, DISTRICT OF CALIFORNIA

MAX STEINFELDT,

Plaintiff in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Opening Brief of Plaintiff in Error

P. S. EHRLICH,

Attorney for Plaintiff in Error

Filed this.....day of October, A. D., 1914

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

THE TEN BOSCH COMPANY, SAN FRANCISCO

Filed

OCT 21 1914

F. D. Monckton,

IN THE
United States Circuit Court of Appeals
NINTH CIRCUIT, DISTRICT OF CALIFORNIA

No. 2444.

MAX STEINFELDT,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Brief for Appellant.

Plaintiff in error, Max Steinfeldt, was convicted of an alleged violation of the Act of February 9, 1909, Chapter 100, 35 Stat. L., Sec. 614.

The claims urged by plaintiff in error and which are covered by proper exceptions and assignments of error, are as follows:

I.

THE ACT OF FEBRUARY 9, 1909, 35 STAT. AT L., 614, IS UNCONSTITUTIONAL AS BEING

AN EXERCISE BY CONGRESS OF THE POLICE POWER RESERVED TO THE STATES.

“1. That the Act of February 9th, 1909, Chapter 100, 35 Statutes at Large, 614, the second section thereof, given in the words ‘or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such opium, or *preparation or derivative thereof after importation*, knowing the same to have been imported contrary to law, such opium or preparation or derivative thereof shall be forfeited and shall be destroyed, and the offender shall be fined in any sum not exceeding five thousand dollars nor less than fifty dollars or by imprisonment for any time not exceeding two years, or both,’ is contrary to the Fifth Amendment to the Constitution of the United States, in that it deprives the defendants of life and liberty without due process of law.” (See Assignments of Error, Trans. p. 10.)

“2. That the Act of February 9th, 1909, Chapter 100, 35 Statutes at Large, 614, the second section thereof, given in the words, ‘or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such opium or preparation, or derivative thereof after importation, knowing the same to have been imported contrary to law, such opium or preparation or derivative thereof shall be forfeited and shall be destroyed, and the offender shall be fined in any sum not exceeding five thousand dollars, nor less than fifty dollars, or by imprisonment for any time not exceeding two years, or both,’ is contrary to the Tenth Amendment to the Constitution of the United States, in that it is an assumption by Congress of powers not delegated to the United States by the Constitution.” (Trans. p. 11.)

"3. That the Act of February 9th, 1909, Chapter 100, 35 Statutes at Large, 614, the second section thereof, given in the words 'or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such opium or preparation or derivative thereof after importation, knowing the same to have been imported contrary to law, such opium or preparation or derivative thereof shall be forfeited and shall be destroyed, and the offender shall be fined in any sum not exceeding five thousand dollars nor less than fifty dollars, or by imprisonment for any time not exceeding two years, or both,' is contrary to the Tenth Amendment of the Constitution of the United States, in that it is an assumption by Congress of powers reserved to the States respectively, or to the people." (Trans. p. 11.)

* * * * *

"6. That the indictment is contrary to Article 1, section 8, of the Constitution of the United States, in that it does not come within the powers of Congress enumerated in Section 8, of Article 1, and is not a law necessary or proper to carry into execution such powers." (Trans. p. 12.)

"7. That the said acts charged in the indictment do not constitute a public offense against the laws of the United States." (Trans. p. 13.)

"8. That the indictment fails to show that the Court has any jurisdiction over the alleged acts as to subject matter." (Trans. p. 13.)

"9. That the indictment fails to show that the Court has any jurisdiction over the alleged acts as to persons." (Trans. p. 13.)

"10. That the indictment does not state facts sufficient to constitute a public offense against the laws of the United States." (Trans. p. 13.)

A.

The Indictment.

The indictment (Trans. p. 2) was presented and filed June 20, 1913, and charges that on the 3rd day of March, 1913, plaintiff in error, Max Steinfeldt, "did then and there, wilfully, fraudulently and knowingly, receive and conceal one can of opium, prepared for smoking purposes, which the said Max Steinfeldt then and there knew *had been imported* into the United States contrary to law."

B.

The Evidence.

The evidence in this case shows that the plaintiff in error was caught by government officials with opium in his possession, at the Argyle Apartments, No. 146 McAllister Street, in the City and County of San Francisco. The evidence further shows that the opium had been left at the office in the lobby of the hotel, and that upon coming into the apartment house Steinfeldt had taken the package from the lobby and was about to take it to his room when arrested. (Trans. p. 26.)

The testimony further shows that it was smoking opium (Trans. pp. 30-31), and not brought in for medicinal purposes. The evidence (Trans. pp. 36 to 38) merely shows acts committed in the hotel building at No. 146 McAllister Street, San Fran-

ciseo, and in no wise connected with the unlawful importation. The claim of the plaintiff in error is that

THE SECTION OF THE ACT OF CONGRESS HERE INVOLVED IS UNCONSTITUTIONAL:

A. IN THAT IT IS AN INTERFERENCE WITH THE POLICE POWER RESERVED TO EACH INDIVIDUAL STATE;

B. IN THAT IT IS AN EXERCISE OF A POWER NOT GRANTED CONGRESS BY THE CONSTITUTION.

This case presents a clear issue as to the constitutionality of that section of the opium statute which reads as follows:

“SEC. 2. (PENALTY FOR VIOLATION—POSSESSION, PROOF OF GUILT.) That if any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any opium or any preparation or derivative thereof contrary to law, *or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such opium or preparation or derivative thereof after importation, knowing the same to have been imported contrary to law, such opium or preparation or derivative thereof shall be forfeited and shall be destroyed, and the offender shall be fined in any sum not exceeding five thousand dollars nor less than fifty dollars, or by imprisonment for any time not exceeding two years, or both.* Whenever, on trial for a violation of this section, the defendant is shown to have, or to have had, possession of such opium or preparation or derivative there-

of, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant shall explain the possession to the satisfaction of the jury."

The first part of this section, making it a criminal offense against the Federal laws to import or bring, or to assist in the bringing in, of opium into the United States, is undoubtedly constitutional, under the commerce clause in the Constitution.

The second part of the section above quoted, and in particular the part herein quoted, to-wit:

"* * * or shall *receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such opium or preparation or derivative thereof after importation*, knowing the same to have been imported contrary to law, such opium or preparation or derivative thereof shall be forfeited and shall be destroyed, and the offender shall be fined in any sum not exceeding five thousand dollars, nor less than fifty dollars, or by imprisonment for any time not exceeding two years, or both."

is undoubtedly an assumption by Congress of the police power of the individual State. We have here a statute of Congress punishing a person, whether he be the twentieth person to handle such opium unlawfully imported, and whether it be opium, or any preparation or derivative thereof, and in any shape or form, irrespective of whether or not such person had any part, or assisted at all, in the unlawful importation. In fact, the section here involved limits its application to opium AFTER IMPORTATION by its own phrase-

ology. In other words, any person in the City of San Francisco, who has smoking opium in his home in any shape or form, knowing the same to have been unlawfully imported, but having nothing to do with the unlawful importation thereof, is subject to arrest by the Federal government.

To take an analogous case: It is now made a criminal offense to import aigrettes into the United States. If this part of the section of the Act of Congress in respect to opium is constitutional, then any woman wearing an aigrette, knowing such aigrette to have been unlawfully imported, is subject to arrest by the Federal government, in spite of the fact that she has taken no part at all in the importation of such aigrettes. If this Act be constitutional, there is no limitation to the power of the Federal Government in its interference with the police power in respect to the morals, the public health and welfare of the citizens of each and every individual State. Yet it has been axiomatic and fundamental in our theory of government that the police power in respect to the public health, morals and social welfare of the citizens of each and every individual State is solely and exclusively for that particular State. This principle of law that the Federal Government cannot interfere with the police power of the individual State is so axiomatic that a long citation of cases is unnecessary, and the mere statement of the rule is sufficient. The only question, therefore, is as to whether or not the statute comes within the purview of this

rule, and is not authorized, if it does come, as an exercise of the commerce power of Congress.

Before citing authorities applicable to the case, we would call to the Court's attention that a duty rests upon this court to declare this Act unconstitutional, if the Court should deem it to be such, and that in order to declare the Act of Congress herein referred to constitutional, it must have its warrant and justification in the powers granted to Congress by the Constitution.

In *United States vs. Scott*, 148 Federal, 432, in discussing the question of the unconstitutionality of a statute of the United States, the Court said:

“Certain other elementary and well-understood propositions may also be noted at this point. First. Unless congressional legislation be supported by constitutional authority, it cannot be supported at all. The rule in this respect is different from the rule applicable to State legislation, which is usually valid unless expressly forbidden. In other words, congressional legislation must have warrant in the language of the Constitution, while State legislation may be valid unless expressly prohibited.

* * * * *

Third. But, if the unconstitutionality of an act is demonstrated, the courts of the United States, whether the highest or the lowest, of them, and especially the former, have not hesitated so to decide. The well-established rule for our guidance in such cases is stated by Chief Justice Fuller in *Pollock vs. Farmers' Loan & Trust Co.*, 157 U. S., at page 554, 15 Sup. Ct. at page 679 (39 L. Ed., 759), as follows:

“ ‘Necessarily, the power to declare a law unconstitutional is always exercised with reluctance, but the duty to do so, in a proper case, cannot be declined, and must be discharged in accordance with the deliberate judgment of the tribunal in which the validity of the enactment is directly drawn in question.’ ”

We would also call to the Court's attention that not only does this section here involved, by its very terms as stated above, operate only after the unlawful importation, but the facts of this case fall within the rule in *United States vs. Caminata*, 194 Fed., 905, where the Court said:

“The offense described in section 2 is committed whenever smoking opium is fraudulently and knowingly brought by an offender within the territorial limits of the United States. The offense is then completed, although the opium may not have been landed from a ship or have been carried across the custom lines.”

That the opium statute is in part unconstitutional has been predetermined in the case of *United States vs. Keller*, 213 U. S. 138, 53 L. ed. 737, by inferential reasoning. In that case that part of a statute practically identical in its terms with the section of the opium statute in question here, was held unconstitutional. The analogy between the two cases is so immediate and direct that we will quote to the Court both statutes:

"Sec. 3. That the importation into the United States of alien woman or girl for the purpose of prostitution, or for any other immoral purpose, is hereby forbidden; and whoever shall, directly or indirectly, import, or attempt to import, into the United States, any alien woman or girl for the purpose of prostitution, or for any other immoral purpose, or whoever shall hold or attempt to hold any alien woman or girl for any such purpose in pursuance of such illegal importation, OR WHOEVER SHALL KEEP, MAINTAIN, CONTROL, SUPPORT OR HARBOR IN ANY HOUSE OR OTHER PLACE FOR THE PURPOSE OF PROSTITUTION, OR FOR ANY OTHER IMMORAL PURPOSE, ANY ALIEN WOMAN OR GIRL, WITHIN THREE YEARS AFTER SHE SHALL HAVE ENTERED THE UNITED STATES, SHALL, IN EVERY SUCH CASE, BE DEEMED GUILTY OF A FELONY, *and, on conviction thereof, be imprisoned not more than five years, and pay a fine of not more than five thousand dollars;* and any alien woman or girl who shall be found an inmate of a house of prostitution, or practicing prostitution, at any time within three years after she shall have entered the United States, *shall be deemed to be unlawfully within the United States, and shall be deported* as provided by sections twenty and twenty-one of this act. (34 Stat. at L. 898, 899, chap. 1134.)

"Sec. 1. That after the first day of April, nineteen hundred and nine, it shall be unlawful to import into the United States opium in any form or any preparation or derivative thereof; *Provided*, That opium and preparations and derivatives thereof, other than smoking opium or opium prepared for smoking, may be imported for medicinal purposes only, under regulations which the Secretary of the Treasury is hereby authorized to prescribe, and when so imported shall be subject to the duties which are now or may hereafter be imposed by law.

"Sec. 2. That if any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any opium or any preparation or *derivative thereof contrary to law*, OR SHALL RECEIVE, CONCEAL, BUY, SELL, OR IN ANY MANNER FACILITATE THE TRANSPORTATION, CONCEALMENT, OR SALE OF SUCH OPIUM OR PREPARATION OR DERIVATIVE THEREOF AFTER IMPORTATION, KNOWING THE SAME TO HAVE BEEN IMPORTED CONTRARY TO LAW, SUCH OPIUM OR PREPARATION OR DERIVATIVE THEREOF *shall be forfeited and shall be destroyed and the offender shall be fined in any sum not exceeding five thousand dollars nor less than fifty dollars, or by imprisonment for any time not exceeding two years, or both.* Whenever, on trial for a violation of this section, the defendant is shown to have, or to have had, possession of such opium or preparation or derivative thereof, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant shall explain the possession to the satisfaction of the jury."

In that case it was held that that section of the Act prohibiting the importation of alien females for

immoral purposes was constitutional, but that section which makes it a Federal offense to keep, maintain, control, support, or harbor in any house or place for immoral purposes any alien woman after importation was held to be unconstitutional, as being beyond the power of Congress, and an invasion of the police power of the individual State. To quote from the decision of Chief Justice Brewer:

“The plaintiffs in error were indicted for a violation of this section, the charge against them being based upon that portion of the section which is in italics, and, in terms, that they ‘wilfully and knowingly did keep, maintain, control, support and harbor in their certain house of prostitution,’ (describing it), ‘for the purpose of prostitution, a certain alien woman, to-wit, Irene Bodi,’ who was, as THEY WELL KNEW, a subject to the King of Hungary, who had entered the United States within three years. A trial was had upon this indictment; the plaintiffs in error were convicted and sentenced to the penitentiary for eighteen months.” Judgment reversed.

* * * * *

“As to the suggestion that Congress has power to punish *one assisting in the importation* of a prostitute, it is enough to say that the statute does not include such a charge. The indictment does not make it; and the testimony shows without any contradiction, that the woman Irene Bodi came to this country in November, 1905; that she remained in New York until October, 1907; then came to Chicago, and went into the house of prostitution which the defendants purchased in November, 1907, finding the woman then in the house; that she had

been in the business of a prostitute only about ten or eleven months prior to the trial of the case in October, 1908, and that the defendants did not know her until November, 1907. In view of those facts, the question of the power of Congress to punish those who *assist in the importation* of a prostitute is entirely immaterial.

“THE ACT CHARGED IS ONLY ONE INCLUDED IN THE GREAT MASS OF PERSONAL DEALINGS WITH ALIENS. IT IS HER OWN CHARACTER AND CONDUCT WHICH DETERMINE THE QUESTION OF EXCLUSION OR REMOVAL. THE ACTS OF OTHERS MAY BE EVIDENCE OF HER BUSINESS AND CHARACTER. BUT IT DOES NOT FOLLOW THAT CONGRESS HAS THE POWER TO PUNISH THOSE WHOSE ACTS FURNISH EVIDENCE FROM WHICH THE GOVERNMENT MAY DETERMINE THE QUESTION OF HER EXPULSION. EVERY POSSIBLE DEALING OF ANY CITIZEN WITH THE ALIEN MAY HAVE MORE OR LESS INDUCED HER COMING. BUT CAN IT BE WITHIN THE POWER OF CONGRESS TO CONTROL ALL THE DEALINGS OF OUR CITIZENS WITH RESIDENT ALIENS? IF *THAT BE POSSIBLE, THE DOOR IS OPEN TO THE ASSUMPTION BY THE NATIONAL GOVERNMENT OF AN ALMOST UNLIMITED BODY OF LEGISLATION.*

* * * * *

“That there is a moral consideration in the facts of this case, that the act charged is within the scope of the police power, is immaterial, for, as stated, there is in the Constitution no grant to Congress of the police power. And the legis-

lation must stand or fall according to the determination of the question of the power of Congress to control generally dealings of citizens with aliens. In other words, an immense body of legislation, which heretofore has been recognized as peculiarly within the jurisdiction of the States, may be taken by Congress away from them. Although Congress has not largely entered into this field of legislation, it may do so, if it has the power, **THEN WE SHOULD BE BROUGHT FACE TO FACE WITH SUCH A CHANGE IN THE INTERNAL CONDITIONS OF THIS COUNTRY AS WAS NEVER DREAMED OF BY THE FRAMERS OF THE CONSTITUTION.**

“While the acts of Congress are to be liberally construed in order to enable it to carry into effect the powers conferred, it is equally true that *prohibitions and limitations upon these powers should also be fairly and reasonably enforced.* *Fairbank vs. United States*, 181 U. S. 283, 45 L. ed. 862, 21 Sup. Ct. Rep. 648. *To exaggerate in the one direction and restrict in the other will tend to substitute one consolidated government for the present Federal system.* We should never forget the declaration in *Texas vs. White*, 7 Wall. 700, 725, 19 L. ed. 227, 237, that “the Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.”

No distinction in reason, law or logic exists between this case and the case at bar, other than that the opium statute makes it essential that the offender know that such opium was unlawfully imported. But this is no valid distinction, as knowledge of the unlawful importation cannot give to Congress powers not granted by the Constitution. Mere

knowing or not knowing of an offense against the government cannot create Federal power, where without such knowledge it is clear no such offense could exist.

The familiar argument was made by the Government in this Keller case, as is contended in this case, that the Act restrains an evil with reference to which it has been universally held that Congress has the power to legislate, and if this be so, then this provision falls within the purview of Congressional legislation, and is valid, as an exercise of the implied power under the commerce clause, notwithstanding the fact, clearly admitted, that each State has the power to punish this offense. The Court clearly answers this argument in the language quoted above.

Admittedly, if this was an exercise of the revenue law, and an attempt to collect duty upon imports—in other words, if Congress was acting in an endeavor to enforce the revenue statutes—the act would be clearly constitutional; but there is not the slightest question here but that the act referred to is not passed under the guise of an endeavor to aid the collection of revenue, which it must be conceded the United States has the right to do, or of any of the constitutional powers of Congress. Thus by analogous reasoning, since the Court held in the Keller case that it was beyond the power of Congress to legislate concerning the morals of alien women within the United States, although such legislation might aid the Federal Government in a

power exclusively within its domain, viz.: the immigration of aliens, then this section of the opium statute at issue here, although it might aid the Federal Government in its power to exclude articles of commerce from the United States, must be held unconstitutional in so far as it punishes those found with opium in their possession within any States after importation has ended. As in the Keller case, so here, the fact that it might aid in the exclusion of opium from the United States, is insufficient to sanction an invasion of the power reserved to the States, and not granted by the commerce clause.

In the case of *Ex Parte Lair*, 177 Fed., 790, the Court said:

“It is conceded on the part of the United States attorney, representing the government, that, in so far as the last three counts of the indictment are concerned, the judgment or sentence is invalid and void, as held by the Supreme Court in the cases of *Keller vs. United States* and *Ullman vs. United States*, 213 U. S. 138, 29 Sup. Ct. 470, 53 L. Ed. 737, for the reason that the offense against public morals, for holding a person in a house of prostitution, pertains to the police power of the State, and it is not within the competency of Congress to regulate or prohibit the same.

* * * * *

“When this indictment was found and the judgment of conviction was entered herein, the cases of *Keller vs. United States* and *Ullman vs. United States*, *supra*, had not been decided, holding that the regulation and prevention of the holding and keeping of a woman for the im-

moral purpose of prostitution was within the exclusive police power of the respective States and was not delegated by the Constitution to Congress."

No comment is necessary.

In *U. S. vs. Westman*, 182 Fed. 1017, the Court said:

"The case of *Keller vs. United States*, 213 U. S. 138, 29 Sup. Ct. 470, 53 L. Ed. 737, is cited in support of the first objection. That was a case involving the keeping, harboring and maintenance of a woman wholly within the confines of a single State for the purpose of prostitution, and it was held that the matter was one for the police regulations of the State. SUCH IS NOT THE CASE HERE, AS ALL THE COUNTS ARE BASED UPON THE ACT OF TRANSPORTATION, OR CAUSING TO BE TRANSPORTED, OR AIDING OR ASSISTING IN THE TRANSPORTATION BY THE PURCHASE OR SUPPLYING WITH TICKETS THEREFOR, ETC., FROM ONE STATE INTO ANOTHER; THE SAID TRANSPORTATION BEING FOR SOME UNLAWFUL PURPOSE DENOUNCED BY THE LAW. Hence, the local feature of the criticisms is eliminated, and the indictment should stand as against the objection."

The only other possible distinction between the case at bar and the cases above cited, and particularly the Keller case, is that in one we have Congress legislating as to persons, and in the other as to things, but no logical distinction can rest in such superficial reasoning.

The Court, in the case of *Hoke vs. United States*, 227 U. S. 322, 57 L. Ed. 927, in discussing the constitutionality of the statute preventing interstate commerce in women, said, in respect to this distinction:

“Commerce among the States, we have said, consists of intercourse and traffic between their citizens, and includes the transportation of persons and property. There may be, therefore, a movement of persons as well as of property; that is, a person may move or be moved in interstate commerce. The power to regulate each of these is identical, both as to its source and its extent.

* * * * *

“Of course it will be said that women are not articles of merchandise, but this does not affect the analogy of the cases; the substance of the congressional power is the same, only the manner of its exercise must be accommodated to the difference in its objects.”

In the case of *United States vs. Gould*, Number 15, 239, 25 Federal Cases 1375, the Court declared an act of Congress unconstitutional which prohibited the keeping of slaves in any particular State knowing them to have been unlawfully imported, although the first section of the act prohibiting the importation of slaves was held constitutional. The case is so analogous and so directly in point that no comment thereon is necessary, and we would call the Court's particular attention thereto. We quote at length therefrom:

“It is settled, by repeated decisions of the Supreme Court, that the commercial power of the general government extends to and covers (exclusively of the interference of State laws) the importation of either goods or persons, until the *commercial transaction of importation is complete and ended, and no further*. When the goods or persons imported pass out of the possession or control of the importer, his agents and employees, and become mingled with the mass of property or population of a State, they then become subject to the State jurisdiction and laws.”

* * * * *

“Judge McLean, one of the majority, in the Passenger Cases, 7 How. (48 U. S.) 467, said:

“‘When the merchandise is taken from the ship, and becomes mingled with the property of the people of the State like other property *it is subject to the local law*; but until this shall take place, the merchandise is an import, *and is not subject to the taxing power of the State*, and the same rule applies to passengers. When they leave the ship, and *minge with the citizens of the States*, they become subject to its laws.’

“This case shows, referring to the Passenger Cases, 7 How., 48 U. S. 405, then, that in this respect, the same principle applies to the importation of *both goods and persons*; that is, that until the *commercial transaction of the importation is complete and ended*, they are subject to the commercial power and laws of the United States; but when the *commercial transaction of importation* is complete and ended, and the goods become mingled with the property, and the persons with the people of a State, *they both then become subject to the State jurisdiction* and State laws. It obviously makes no difference that the persons are negroes, and in-

tended by the importer as slaves. Whether they are to be considered as slaves or free, as chattels or persons, the same principle applies to them. The cases referred to show the extent and limit of this power over foreign commerce. It covers and extends to the whole commercial transaction of importation; and, in respect to negroes unlawfully imported as slaves, to their removal out of the country. This is its extent and its limit. In my opinion, it never was the intention of the framers of the Constitution that the several States should surrender to the general government this power to fix the status, prescribe the rights and provide for the protection of free negroes, or any other inhabitants of a State. Suppose that a negro, *unlawfully imported, is residing in Alabama, either as a freeman, or wrongfully held as a slave, and that any person should beat, maim or murder such negro in Alabama, what law would be violated, and under what law could the offender be tried and punished? Most unquestionably the State law.* So, too, if he is wrongfully deprived of his freedom, it is the State law which is violated, and the State law under which the offender is to be punished. *Such an offense has no connection with, or relation to foreign commerce, and is entirely without and beyond the power given to Congress over any branch of foreign commerce.* * * *

“UNDER THE CONSTRUCTION WHICH I GIVE TO THE LAW, THE INDICTMENT IN THIS CASE IS NOT MAINTAINABLE. IT DOES NOT ALLEGE THAT THE ACCUSED HAD ANY CONNECTION WHATEVER WITH THE UNLAWFUL IMPORTATION; NOR DOES IT ALLEGE ANY FACTS FROM WHICH THIS COULD BE LEGALLY INFERRED. IT SIMPLY ALLEGES THAT THE AC-

CUSED KNOWINGLY HELD, AS A SLAVE, IN ALABAMA, A NEGRO, WHO HAD PREVIOUSLY BEEN UNLAWFULLY IMPORTED, BY SOME OTHER UNKNOWN PERSON. THIS, I THINK, IS NOT AN INDICTABLE OFFENSE, UNDER THE CONSTITUTIONAL LAWS OF THE UNITED STATES."

It is necessary to cite only a few cases to the effect that the State has the power, and the exclusive power, to regulate vice and morality, and public health, and to pass the necessary laws for the protection of its citizens with reference thereto.

In the celebrated License Cases, 5 Howard 504, the Court said:

"It is possible, that, under our system of double governments over one and the same people, the States cannot prohibit the mere arrival of vessels and cargoes which they may deem dangerous in character to their public peace, or public morals, or general health. This might, perhaps, trench on foreign commerce. Nor can they tax them as imports. This might trench on that part of the constitution which forbids States to lay duties on imports. But after articles have come within the territorial limits of the States, whether on land or water, the destruction *itself of what contains* disease and death, and the *longer continuance* of such articles within their limits, or the terms and conditions of their continuance, when conflicting with *their legitimate police, or with their power over internal commerce*, or with their right of taxation over all persons and property under their protection and jurisdiction, seems one of

the first principles of State sovereignty, and indispensable to public safety.”

In *Mugler vs. State of Kansas*, 123 U. S. 623, 31 L. Ed. 205, the Court said:

“This conclusion is unavoidable, unless the fourteenth amendment of the Constitution takes from the States of the Union those powers of police that were reserved at the time the original constitution was adopted. But this Court has declared, upon full consideration, in *Barbier vs. Connolly*, 113 U. S. 31, that the fourteenth amendment had no such effect. After observing, among other things, that that amendment forbade the arbitrary deprivation of life or liberty, and the arbitrary spoliation of property, and secured equal protection to all under like circumstances, in respect as well to their personal and civil rights as to their acquisition and enjoyment of property, the Court said: ‘But neither the amendment, broad and comprehensive as it is, nor any other amendment, was designed to interfere with the power of the State, sometimes termed “its police power,” to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity.’ Undoubtedly the State, when providing, by legislation, for the protection of the public health, the public morals, or the public safety, is subject to the paramount authority of the Constitution of the United States, and may not violate rights secured or guaranteed by that instrument, or interfere with the execution of the powers confided to the general government. *Henderson vs. Mayor of New York*, 92 U. S. 259; *Railroad Co.*

vs. *Husen*, 95 U. S. 465; *Gas-Light Co. vs. Light Co.*, 115 U. S. 650; 6 Sup. Ct. Rep. 252; *Walling vs. Michigan*, 116 U. S. 446; 6 Sup. Ct. Rep. 454; *Yick Wo. vs. Hopkins*, 118 U. S. 356; 6 Sup. Ct. Rep. 1064; *Steam-Ship Co. vs. Board of Health*, 118 U. S. 455, 6 Sup. Ct. Rep. 1114."

To this effect, see also the celebrated case of *Patterson vs. Kentucky*, 97 U. S. 501.

In *U. S. vs. Reese*, 92 U. S. 220, the Court said:

"We are, therefore, directly called upon to decide whether a penal statute enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose, we must take these sections of the statute as they are. WE ARE NOT ABLE TO REJECT A PART WHICH IS UNCONSTITUTIONAL, AND RETAIN THE REMAINDER, BECAUSE IT IS NOT POSSIBLE TO SEPARATE THAT WHICH IS UNCONSTITUTIONAL, IF THERE BE ANY SUCH, FROM THAT WHICH IS NOT. THE PROPOSED EFFECT IS NOT TO BE ATTAINED BY STRIKING OUT OR DISREGARDING WORDS THAT ARE IN THE SECTION, BUT BY INSERTING THOSE THAT ARE NOT NOW THERE. EACH OF THE SECTIONS MUST STAND AS A WHOLE, OR FALL TOGETHER. THE LANGUAGE IS PLAIN. THERE IS NO ROOM FOR CONSTRUCTION, UNLESS IT BE AS TO THE EFFECT OF THE CONSTITUTION. THE QUESTION, THEN, TO BE DETERMINED IS,

WHETHER WE CAN INTRODUCE WORDS OF LIMITATION INTO A PENAL STATUTE SO AS TO MAKE IT SPECIFIC, WHEN, AS EXPRESSED, IT IS GENERAL ONLY.

"IT WOULD CERTAINLY BE DANGEROUS IF THE LEGISLATURE COULD SET A NET LARGE ENOUGH TO CATCH ALL POSSIBLE OFFENDERS, AND LEAVE IT TO THE COURTS TO STEP INSIDE AND SAY WHO COULD BE RIGHTFULLY DETAINED, AND WHO SHOULD BE SET AT LARGE. This would, to some extent, substitute the judicial for the legislative department of the government. The courts enforce the legislative will when ascertained, if within the constitutional grant of power. *Within its legitimate sphere, Congress is supreme, and beyond the control of the courts; but if it steps outside of its constitutional limitations, and attempts that which is beyond its reach, the courts are authorized to, and when called upon in due course of legal proceedings must, annul its encroachments upon the reserved power of the States and the people.*"

In this connection we would call the Court's attention to the case of *Illinois C. R. Co. vs. McKendree*, 203 U. S. 544, 51 L. Ed. 398, in which the Court said:

"The terms of order 107 apply to all cattle transported from the south of this line to parts of the United States north thereof. It would, therefore, include cattle transported within the State of Tennessee from the south of the line as well as those from outside that State; there is no exception in the order, and in terms it includes all cattle transported from the south of

the line, whether within or without the State of Tennessee. It is urged by the Government that it was not the intention of the Secretary to make provision for intrastate commerce, as the recital of the order shows an intention to adopt the State line, when the State by its legislature has passed the necessary laws to enforce the same completely and strictly. But the order in terms applies alike to interstate and intrastate commerce. A party prosecuted for violating this order would be within its terms if the cattle were brought from the south of the line to a point north of the line within the State of Tennessee. It is true the Secretary recites that legislation has been passed by the State of Tennessee to enforce the quarantine line, but he does not limit the order to interstate commerce coming from the south of the line, and, as we have said, the order in terms covers it. We do not say that the State line might not be adopted in a proper case, in the exercise of Federal authority, if limited to its effect to interstate commerce coming from below the line, but that it is not the present order, and we must deal with it as we find it. **NOR HAVE WE THE POWER TO SO LIMIT THE SECRETARY'S ORDER AS TO MAKE IT APPLY ONLY TO INTERSTATE COMMERCE, WHICH IT IS URGED IS ALL THAT IS HERE INVOLVED. FOR AUGHT THAT APPEARS UPON THE FACE OF THE ORDER, THE SECRETARY INTENDED IT TO APPLY TO ALL COMMERCE, AND WHETHER HE WOULD HAVE MADE SUCH AN ORDER, IF STRICTLY LIMITED TO INTERSTATE COMMERCE, WE HAVE NO MEANS OF KNOWING. THE ORDER IS IN TERMS SINGLE AND INDIVISIBLE.**

In 100 U. S. 98, Trade-Mark Cases, the Court said:

“It was urged, however, that the general description of the offense included the more limited one, and that the section was valid where such was in fact the cause of denial. But the Court said, through the Chief Justice: ‘We are not able to reject a part which is unconstitutional and retain the remainder, because it is not possible to separate that which is constitutional if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not there now. Each of the sections must stand as a whole, or fall together. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined, is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only.

* * * * *

“To limit this statute in the manner now *asked for would be to make a new law*, not to *enforce an old one*. This is no part of our duty. If we should, in the case before us, undertake to make by judicial construction a law which Congress did not make, it is quite probable we should do what, if the matter were not before that body, it would be unwilling to do; namely, make a trade-mark law which is only partial in its operation, and which would complicate the rights which parties would hold, in some instances under the Act of Congress, and in others under State law. *Cooley, Const. Lim.* 178, 179; *Commonwealth vs. Hitchings*, 5 Gray (Mass.) 482.”

In *Howard vs. Illinois Central R. Co.*, 207 U. S. 463, 52 L. Ed. 297, the Court, in speaking of the Employers' Liability Statutes as applied to railroads, said in part:

"The Act, then, being addressed to all common carriers engaged in interstate commerce, and imposing a liability upon them in favor of their employees, without qualification or restriction as to the business in which the carriers or their employees may be engaged at the time of the injury, of necessity includes subjects wholly outside of the power of Congress to regulate commerce.

* * * * *

"It remains only to consider the contention which we have previously quoted, that the Act is constitutional although it embraces subjects not within the power of Congress to regulate commerce, because one who engages in interstate commerce thereby submits all his business concerns to the regulating power of Congress. To state the proposition is to refute it. It assumes that, because one engages in interstate commerce, he thereby endows Congress with power not delegated to it by the Constitution; in other words, with the right to legislate concerning matters of purely State concern. It rests upon the conception that the Constitution destroyed that freedom of commerce which it was its purpose to preserve, since it treats the right to engage in interstate commerce as a privilege which cannot be availed of except upon such conditions as Congress may prescribe, even although the conditions would be otherwise beyond the power of Congress. IT IS APPARENT THAT IF THE CONTENTION WERE WELL FOUNDED IT WOULD EXTEND

THE POWER OF CONGRESS TO EVERY CONCEIVABLE SUBJECT, HOWEVER INHERENTLY LOCAL, WOULD OBLITERATE ALL THE LIMITATIONS OF POWER IMPOSED BY THE CONSTITUTION, AND WOULD DESTROY THE AUTHORITY OF THE STATES AS TO ALL CONCEIVABLE MATTERS WHICH, FROM THE BEGINNING, HAVE BEEN, AND MUST CONTINUE TO BE, UNDER THEIR CONTROL SO LONG AS THE CONSTITUTION ENDURES.

* * * * *

“Concluding, as we do, that the statute, whilst it embraces subjects within the authority of Congress to regulate commerce, also includes subjects not within its constitutional power, and that the two are so interblended in the statute that they are incapable of separation, we are of the opinion that the courts below rightly held the statute to be repugnant to the Constitution and nonenforceable; and the judgments below are, therefore, affirmed.”

In *New York vs. Miln*, 11 Peters 102, it was held that a State statute requiring a report from the master of a vessel, of the name, age, place of birth and last legal settlement of each passenger is not a regulation of commerce, but of police, and is an exercise of a power which rightfully belongs to the State, as the operation of the law only begins when the rights of Congress to enact a law end. The Court said in part:

“We choose rather to plant ourselves on what we consider impregnable positions. They are these: That a State has the same undeniable

and unlimited jurisdiction over all persons and things within its territorial limits, as any foreign nation, where that jurisdiction is not surrendered or restrained by the Constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty of a State to advance the safety, happiness, and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends, where the power over the particular subject, or the manner of its exercise, is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a State is complete, unqualified and exclusive."

In *Abby Dodge vs. United States*, 223 U. S. 166, 56 L. Ed. 393, the Court, in holding that the Act of Congress making it unlawful to land, deliver, cure or offer for sale at any port or place in the United States sponges taken from the waters of the Gulf of Mexico or the Straits of Florida could only be constitutional if applied to sponges taken outside the territorial limits of a State, and that any other interpretation would plainly render the statute unconstitutional as an excess of the powers of Congress for the taking of sponges from land under the waters within a State territorial limit is not subject to control of Congress, said:

"As, by the interpretation which we have

given the statute, its *operation is confined to the landing of sponges taken outside of the territorial limits of a State*, and the libel does not so charge,—that is, its averments do not negative the fact that the sponges may have been taken from waters within the territorial limits of a State,—it follows that the libel failed to charge an element essential to be alleged and proved, in order to establish a violation of the statute. *United States vs. Britton*, 107 U. S. 655, 661, 662, 27 L. Ed. 520, 522, 523, 2 Sup. Ct. Rep. 512, and cases cited.

* * * * *

“In view of the paramount authority of Congress over foreign commerce, through abundance of precaution we say that nothing in this opinion implies a want of power in Congress, when exerting its absolute authority to prohibit the BRINGING OF MERCHANDISE, the subject of such commerce, INTO THE UNITED STATES, to cast upon one seeking to bring in the merchandise, the burden, if an exemption from the operation of the statute is claimed, of establishing a right to the exemption.”

Gutierrez, 215 U. S. 87, 54 L. Ed., the Court, in discussing the Employers’ Liability Statute of Congress, said:

“A perusal of the section makes it evident that Congress is here dealing, first with trade or commerce in the District of Columbia and the territories; and, second, with interstate commerce, commerce with foreign nations, and between the territories and the States. As we have already indicated, its power to deal with trade or commerce in the District of Columbia

and the territories does not depend upon the authority of the interstate commerce clause of the Constitution. Upon the other hand, the regulation sought to be enacted as to commerce between the States and with foreign nations depends upon the authority of Congress granted to it by the Constitution to regulate commerce among the States and with foreign nations. As to the latter class, Congress was dealing with a liability ordinarily governed by State statutes, or controlled by the common law as administered in the several States. **THE FEDERAL POWER OF REGULATION WITHIN THE STATES IS LIMITED TO THE RIGHT OF CONGRESS TO CONTROL TRANSACTIONS OF INTERSTATE COMMERCE; IT HAS NO AUTHORITY TO REGULATE COMMERCE WHOLLY OF A DOMESTIC CHARACTER.** It was because Congress had exceeded its authority in attempting to regulate the second class of commerce named in the statute that this court was constrained to hold the act unconstitutional. The act undertook to fix the liability as to "any employee," whether engaged in interstate commerce or not; and, in the terms of the Act, had so interwoven and blended the regulation of liability within the authority of Congress with that which was not that the whole Act was held invalid in this respect."

It is evident that, although Congress may legislate concerning opium under the commerce power, and exclude opium from the United States, and may enact laws seeking to make effective this exclusion, yet there is a limit to which the power of Congress extends. As in these cases just quoted, although Congress in its absolute and exclusive control of inter-

state commerce may pass a Federal Employers' Liability Law, yet if such law acts not only upon interstate commerce but upon intrastate commerce, it must be held unconstitutional. And so, although the power of Congress to exclude opium comes under the commerce power, yet in determining whether or not the Act in question is constitutional, it must be recognized that the commerce power of Congress is limited to its particular sphere of interstate and foreign commerce.

It is the contention of the Government that this commerce power of Congress which prohibits the carrying of obscene literature and articles designed for indecent and immoral purposes from one State to another, and suppresses the lottery traffic, traffic in adulterated foods, and passes anti-trust laws, live stock laws, meat inspection and quarantine laws, etc., will also justify the constitutionality of the opium statute herein referred to. But it cannot be too clearly emphasized that those Acts held to be constitutional have been held to be so only insofar as they affected interstate commerce, and not intrastate commerce; and in every particular instance where the power of Congress has been exercised so as to indiscriminately affect INTRA as WELL as INTERSTATE commerce, the Acts have been held unconstitutional.

In the celebrated case of *Champion vs. Ames*, 188 U. S. 321, 47 L. Ed. 492, known as the Lottery Case, the Court clearly and most emphatically recognizes this contention, namely: that the power to prohibit lotteries extends only so far as interstate commerce

is concerned, and cannot interfere with internal affairs of any State. To quote from Judge Harlan, who wrote the opinion:

“If a State, when considering legislation for the suppression of lotteries within its own limits, may properly take into view the evils that inhere in the raising of money, in that mode, why may not Congress, invested with the power to regulate commerce among the several States, provide that such commerce shall not be polluted by the carrying of lottery tickets from one State to another?

* * * * *

“BESIDES, CONGRESS, BY THAT ACT, DOES NOT ASSUME TO INTERFERE WITH TRAFFIC OR COMMERCE IN LOTTERY TICKETS CARRIED ON EXCLUSIVELY WITHIN THE LIMITS OF ANY STATE, BUT HAS IN VIEW ONLY COMMERCE OF THAT KIND AMONG THE SEVERAL STATES. IT HAS NOT ASSUMED TO INTERFERE WITH THE COMPLETELY INTERNAL AFFAIRS OF ANY STATE, AND HAS ONLY LEGISLATED IN RESPECT OF A MATTER WHICH CONCERNS THE PEOPLE OF THE UNITED STATES. AS A STATE MAY, FOR THE PURPOSE OF GUARDING THE MORALS OF ITS OWN PEOPLE, FORBID ALL SALES OF LOTTERY TICKETS WITHIN ITS LIMITS, SO CONGRESS, FOR THE PURPOSE OF GUARDING THE PEOPLE OF THE UNITED STATES AGAINST THE ‘WIDESPREAD PESTILENCE OF LOTTERIES, AND TO PROTECT THE COMMERCE WHICH CONCERNS ALL THE STATES, MAY PRO-

PROHIBIT THE CARRYING OF LOTTERY TICKETS FROM ONE STATE TO ANOTHER. IN LEGISLATING UPON THE SUBJECT OF THE TRAFFIC IN LOTTERY TICKETS, AS CARRIED ON THROUGH INTERSTATE COMMERCE, CONGRESS ONLY SUPPLEMENTED THE ACTION OF THOSE STATES—PERHAPS, ALL OF THEM—WHICH, FOR THE PROTECTION OF THE PUBLIC MORALS, PROHIBIT THE DRAWING OF LOTTERIES, AS WELL AS THE SALE OR CIRCULATION OF LOTTERY TICKETS, WITHIN THEIR RESPECTIVE LIMITS. IT SAID, IN EFFECT, THAT IT WOULD NOT PERMIT THE DECLARED POLICY OF THE STATES, WHICH SOUGHT TO PROTECT THEIR PEOPLE AGAINST THE MISCHIEFS OF THE LOTTERY BUSINESS, TO BE OVERTHROWN OR DISREGARDED BY THE AGENCY OF INTERSTATE COMMERCE. WE SHOULD HESITATE LONG BEFORE ADJUDGING THAT AN EVIL OF SUCH APPALLING CHARACTER, CARRIED ON THROUGH INTERSTATE COMMERCE, CANNOT BE MET AND CRUSHED BY THE ONLY POWER COMPETENT TO THAT END, BECAUSE CONGRESS ALONE HAS THE POWER TO OCCUPY, BY LEGISLATION, THE WHOLE FIELD OF INTERSTATE COMMERCE.

* * * * *

“We decide nothing more in the present case than that the lottery tickets are subjects of traffic among those who choose to sell or buy them; that THE CARRIAGE OF SUCH TICKETS BY INDEPENDENT CARRIERS FROM ONE STATE TO ANOTHER IS THERE-

FORE INTERSTATE COMMERCE: THAT UNDER ITS POWER TO REGULATE COMMERCE AMONG THE SEVERAL STATES CONGRESS—SUBJECT TO THE LIMITATIONS IMPOSED BY THE CONSTITUTION UPON THE EXERCISE OF THE POWERS GRANTED—HAS PLE-NARY AUTHORITY OVER SUCH COM-MERCE, AND MAY PROHIBIT THE CARRIAGE OF SUCH TICKETS FROM STATE TO STATE; AND THAT LEGISLA-TION TO THAT END, AND OF THAT CHARACTER, IS NOT INCONSISTENT WITH ANY LIMITATION OR RESTRIC-TION IMPOSED UPON THE EXERCISE OF THE POWERS GRANTED TO CON-GRESS.”

To quote again from *Hoke vs. United States*, *supra*, where the Court said:

“We may illustrate again by the Pure Food and Drugs Act. Let an article be debased by adulteration, LET IT BE MISREPRE-SENTED BY FALSE BRANDING, AND CONGRESS MAY EXERCISE ITS PRO-HIBITIVE POWER. IT MAY BE THAT CONGRESS COULD NOT PROHIBIT THE MANUFACTURE OF THE ARTICLE IN A STATE. IT MAY BE THAT CONGRESS COULD NOT PROHIBIT IN ALL OF ITS CONDITIONS ITS SALE WITHIN A STATE. BUT CONGRESS MAY PRO-HIBIT ITS TRANSPORTATION BE-TWEEN THE STATES, AND BY THAT MEANS DEFEAT THE MOTIVE AND EVILS OF ITS MANUFACTURE.”

In this connection, we would call the Court’s par-

tiacular attention to the case of *In re Heff*, 197 U. S. 488, 49 L. Ed. 848, and in particular this sentence:

“It is true the National Government exacts a license as a condition of the sale of intoxicating liquor, but that is solely for the purpose of revenue, and is no admitted exercise of the police power.”

In other words, this case holds, as will be seen from the following quotation, that as an exercise of the revenue statute, the power of Congress to tax liquor may be sustained as such, but if an admitted exercise of the police power, it is clearly unconstitutional.

To quote from *In re Heff*:

“We do not doubt that the construction placed by these several courts upon this section is correct, and that John Butler, at the time the defendant sold him the liquor, was a citizen of the United States and of the State of Kansas, having the benefit of, and being subject to, the laws, both civil and criminal, of that State. Under these circumstances, could the conviction of the petitioner in the Federal Court of a violation of the Act of Congress of January 30, 1897, be sustained? In this Republic there is a dual system of government, national and State. Each within its own domain is supreme, and one of the chief functions of this Court is to preserve the balance between them, protecting each in the powers it possesses, and preventing any trespass thereon by the other. The general police power is reserved to the States, subject, however, to the limitation that in its exercise the State may not trespass upon the rights and

powers vested in the general government. The regulation of the sale of intoxicating liquors is one of the most common and significant exercises of the police power. AND SO FAR AS IT IS AN EXERCISE OF THE POLICE POWER IT IS WITHIN THE DOMAIN OF STATE JURISDICTION. IT IS TRUE THE NATIONAL GOVERNMENT EXACTS LICENSES AS A CONDITION OF THE SALE OF INTOXICATING LIQUORS, BUT THAT IS SOLELY FOR THE PURPOSE OF REVENUE, AND IS NO ATTEMPTED EXERCISE OF POLICE POWER. A LICENSE FROM THE UNITED STATES DOES NOT GIVE THE LICENSEE AUTHORITY TO SELL LIQUOR IN A STATE WHOSE LAWS FORBID ITS SALE, AND NEITHER DOES A LICENSE FROM A STATE TO SELL LIQUOR ENABLE THE LICENSEE TO SELL WITHOUT PAYING THE TAX AND OBTAINING THE LICENSE REQUIRED BY THE FEDERAL STATUTE. License Cases, 5 How. 504, 12 L. Ed. 256; *McGuire vs. Massachusetts*, 3 Wall. 387; 18 L. Ed. 165; License Tax Cases, 5 Wall. 462; 18 L. Ed. 497. NOW THE ACT OF 1897 IS NOT A REVENUE STATUTE, BUT PLAINLY A POLICE REGULATION. IT WILL NOT BE DOUBTED THAT AN ACT OF CONGRESS ATTEMPTING AS A POLICE REGULATION TO PUNISH THE SALE OF LIQUOR BY ONE CITIZEN OF A STATE TO ANOTHER WITHIN THE TERRITORIAL LIMITS OF THAT STATE WOULD BE AN INVASION OF THE STATE'S JURISDICTION, AND COULD NOT BE SUSTAINED; AND IT WOULD BE IMMATERIAL WHAT THE ANTECEDENT STATUS OF EITHER BUYER OR SELLER WAS. THERE IS IN

THESE POLICE MATTERS NO SUCH THING AS A DIVIDED SOVEREIGNTY. JURISDICTION IS VESTED ENTIRELY IN EITHER THE STATE OR THE NATION, AND NOT DIVIDED BETWEEN THE TWO."

* * * * *

"In *United States vs. Dewitt*, 9 Wall. 41, 19 L. Ed. 593, the question was whether the 29th section of the Internal Revenue Act of March 2, 1867 (14 Stat. at L. 484, Chap. 169), which established a police regulation in respect to the mixing for sale, or the selling, of naphtha and illuminating oils, was enforceable within the limits of a State, and it was held that it was not, the Court saying (p. 45, L. Ed., p. 594):

"‘As a police regulation, relating exclusively to the internal trade of the States, it can only have effect where the legislative authority of Congress excludes, territorially, all State legislation, as, for example, in the District of Columbia. Within State limits it can have no constitutional operation.’"

We would call to the Court's attention the recent case of *United States vs. Shaurer*, 214 Fed. 155, Aug. 6, 1914, decided by District Judge Trieber.

This was a demurrer to an indictment for violation of certain regulations made by the Department of Agriculture pursuant to the following Migratory Bird Provision in the Act of March 4th, 1913, concerning the Department of Agriculture:

"All wild geese, wild swans, brant, wild ducks, snipe, plover, woodcock, rail, wild pigeons, and all other migratory game and insectivorous birds which in their northern and southern mi-

grations pass through or do not remain permanently the entire year within the borders of any State or Territory, shall hereafter be deemed to be within the custody and protection of the Government of the United States, and shall not be destroyed or taken contrary to the regulations hereinafter provided therefor."

In holding this Act unconstitutional, the Court said:

"It is equally well settled that as to all internal affairs the States retained their police power, which they, as sovereign nations possessed prior to the adoption of the national Constitution, and no such powers were granted to the nation. *Cooley*, Const. Lim. 574; *Patterson vs. Kentucky*, 97 U. S. 501, 503, 24 L. Ed. 1115; *Covington, etc., Bridge Co. vs. Kentucky*, 154 U. S. 204, 210, 14 Sup. Ct. 1087, 38 L. Ed. 962; *United States vs. Boyer*, (D. C.) 85 Fed. 425, 434."

* * * * *

"It is also claimed that it is one of those implied attributes of sovereignty in which the National Government has concurrent jurisdiction with the States; that it is a dormant right in the National Government; and, where the State is clearly incompetent to save itself, the National Government has the right to aid. To sustain the latter proposition stress is laid on the fact that it is impossible for any State to enact laws for the protection of migratory wild game, and only the National Government can do it with any fair degree of success; consequently the power must be national and vested in the Congress of the United States. A similar argument was presented to the court in *Kansas vs. Colorado*, 206 U. S. 46, 89, 27 Sup. Ct. 655,

664, 51 L. Ed. 956, but held untenable. Mr. Justice Brewer, speaking for the Court, disposed of it by saying:

“ ‘But the proposition that there are legislative powers affecting the nation as a whole, which belong to, although not expressed in, the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. That this is such a government clearly appears from the Constitution, independently of the amendment, for otherwise there would be an instrument granting certain specified things made operative to grant other and distinct things. This natural construction of the original body of the Constitution is made absolutely certain by the tenth amendment. This amendment, which was seemingly adopted with prescience of just such a contention as the present, disclosed the widespread fear that the National Government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that, if in the future further powers seemed necessary, they should be granted by the people in the manner they had provided for amending that Act * * * Its principal purpose was not the distribution of power between the United States and the States, but a reservation of the people of all powers not granted.’

* * * * *

“It is also argued that Congress has frequently exercised the power to regulate matter which could only have been done under the general police power, and the validity of these Acts, when attacked as beyond the power of

Congress, has been upheld. Counsel refer to the Lottery Acts, the Anti-Trust Acts, the national railway legislation, the Safety Appliance Act, the Quarantine Laws, the Pure Food and Drug Act, the White Slave Act, the Act regulating mailable articles, and other Acts of similar nature. BUT EVERY ONE OF THESE ACTS WAS UPHELD UNDER SOME PROVISION OF THE CONSTITUTION, EITHER THAT OF THE POSTOFFICE DEPARTMENT, THE COMMERCE CLAUSE, THE TAXING POWER, OR SOME OTHER GRANT. Whenever Congress or the head of a department went beyond that power, as by *including intrastate carriage with interstate*, the Acts were declared *unconstitutional*. Trade-Mark cases, 100 U. S. 82, 25 L. Ed. 550; *Illinois Central Ry. Co. vs. McKendree*, 203 U. S. 514, 27 Sup. Ct. 153, 51 L. Ed. 298; Employers' Liability Cases, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297. *Butts vs. Merchants' Transp. Co.*, 230 U. S. 126, 33 Sup. Ct. 964, 57 L. Ed. 1422.

"It may be, as contended, on behalf of the government, that only by national legislation can migratory wild game and fish be preserved to the people, but that is not a matter for the courts. It is the people who alone can amend the Constitution to grant Congress the power to enact such legislation as they deem necessary. All the courts are authorized to do when the constitutionality of a legislative Act is questioned is to determine whether Congress, under the Constitution as it is, possesses the power to enact the legislation in controversy; their power does not extend to the matter of expediency. If Congress has not the power, the duty of the court is to declare the Act void. The court is unable to find any provision in the Constitution authorizing Congress, either expressly or by

necessary implication, to protect or regulate the shooting of migratory wild game when in a State, and is therefore forced to the conclusion that the Act is unconstitutional.”

The government points to the pure food and drugs decisions of the United States courts to sustain the constitutionality of the section involved in the case at bar. It will be our plan to cite the pure food and drug decisions bearing on the constitutionality of the opium statute, and then point out the features distinguishing those cases from the case at bar, and demonstrate that, although broad statements may have been perhaps enunciated in those cases, they were yet dicta and were not justified by the facts in the case.

As the “original package” doctrine is closely connected with these decisions, we quote here without a lengthy discussion thereof, this doctrine.

In *Vance vs. W. A. Vandercook Co.*, 170 U. S. 438, 42 L. Ed. 1101, the Court said here, referring to all the authorities on this principle:

“It is also certain that the settled doctrine is that the power to ship merchandise from one State into another carries with it, as an incident, THE RIGHT IN THE RECEIVER OF THE GOODS TO SELL THEM IN THE ORIGINAL PACKAGES, ANY STATE REGULATION TO THE CONTRARY NOTWITHSTANDING; that is to say, that the goods received by interstate commerce REMAİN UNDER THE SHELTER OF THE INTERSTATE COMMERCE CLAUSE OF THE CONSTITUTION, UNTIL BY A SALE IN

THE ORIGINAL PACKAGE THEY HAVE BEEN COMMINGLED WITH THE GENERAL MASS OF PROPERTY IN THE STATE.

“This last proposition, however, whilst generally true, is no longer applicable to intoxicating liquors, since Congress, in the exercise of its lawful authority, has recognized the power of the several States to control the incidental right of sale in the original packages, of intoxicating liquors shipped into one State from another, so as to enable the States to prevent the exercise by the receiver of the accessory right of selling intoxicating liquors in the original packages except in conformity to lawful State regulations. In other words, by virtue of the Act of Congress the receiver of intoxicating liquors in one State, sent from another, can no longer assert a right to sell in defiance of the State law in the original packages, because Congress has recognized to the contrary.”

We call to the Court's attention that in no single case has the Supreme Court of the United States, in spite of the many dicta to that effect, ever extended the power of Congress beyond this original package doctrine and the Supreme Court has universally held from the case of *Brown vs. Maryland* down to the very recent pure food and drug decisions now to be discussed, that the power of Congress only extends to merchandise in the original package and before the incorporation of such merchandise in the general mass of the property in any particular State. Bearing this important limitation universally applied by the Supreme Court of the United States to the commerce power of the

Federal Government, we turn to the pure food and drug cases relied upon by the government.

The facts in the case of *Hypolite Egg Company vs. United States*, 220 U. S. 45, 55 L. Ed. 365, the first case to be considered, were as follows:

“Thomas & Clark procured the shipment of the eggs to themselves at Peoria, and, upon the receipt of them placed the shipment in their storeroom in their bakery factory along with other bakery supplies. The eggs were intended for baking purposes, and were not intended for sale in the original unbroken packages or otherwise, and were not so sold.”

In its decision the Court said:

“In the case at bar there was no sale of the articles after they were committed to interstate commerce, **NOR WERE THE ORIGINAL PACKAGES BROKEN.** Indeed, it might be insisted that we need go no farther than that case for the rule of decision in this. It affirms the doctrine of original packages which was expressed and illustrated in previous cases and has been expressed and illustrated in subsequent ones. It is too firmly fixed to need or even to justify further discussion, and we shall not stop to affirm or deny its application to the special contention of the egg company.

“The statute declares that it is one ‘for preventing * * * the transportation of adulterated * * * foods * * * and for regulating traffic therein,’ and, as we have seen, Sec. 2 makes the shipping of them criminal, and Sec. 10 subjects them to confiscation, and, in some cases, to destruction, so careful is the statute to prevent a defeat of its purpose. In

other words, transportation in interstate commerce is forbidden to them and in a sense they are made culpable as well as their shipper. It is clearly the purpose of the statute that they shall not be stealthily put into interstate commerce and be stealthily taken out again upon arriving at their destination, and be given asylum in the mass of property of the State. CERTAINLY NOT, WHEN THEY ARE YET IN THE CONDITION IN WHICH THEY WERE TRANSPORTED TO THE STATE, OR, TO USE THE WORDS OF THE STATUTE, WHILE THEY REMAIN 'IN THE ORIGINAL, UNBROKEN PACKAGES.' IN THAT CONDITION THEY CARRY THEIR OWN IDENTIFICATION AS CONTRABAND OF LAW. WHETHER THEY MIGHT BE PURSUED BEYOND THE ORIGINAL PACKAGE *WE ARE NOT CALLED UPON TO SAY*. THAT FAR THE STATUTE PURSUED THEM, AND, WE THINK, LEGALLY PURSUED THEM, AND TO DEMONSTRATE THIS BUT LITTLE DISCUSSION IS NECESSARY.

"The statute rests, of course, upon the power of Congress to regulate interstate commerce."

* * * * *

"What power has Congress over such articles? Can they escape the consequences of their illegal transportation by being mingled at the place of destination with other property? To give them such immunity would defeat, in many cases, the provision for their confiscation, and their confiscation or destruction is the especial concern of the law. The power to do so is certainly appropriate to the right to bar them from interstate commerce, and completes its purpose, which is not to prevent merely the physical movement of adulterated articles, but the use of

them, or rather to prevent trade in them between the States by denying to them the facilities of interstate commerce. AND APPROPRIATE MEANS TO THAT END, WHICH WE HAVE SEEN IS LEGITIMATE, ARE THE SEIZURE AND CONDEMNATION OF THE ARTICLES AT THEIR POINT OF DESTINATION IN THE ORIGINAL, UNBROKEN PACKAGES. THE SELECTION OF SUCH MEANS IS CERTAINLY WITHIN THAT BREADTH OF DISCRETION WHICH WE HAVE SAID CONGRESS POSSESSES IN THE EXECUTION OF THE POWERS CONFERRED UPON IT BY THE CONSTITUTION. *McCulloch vs. Maryland*, 4 Wheat. 316, 4 L. Ed. 579; Lottery Case (*Champion vs. Ames*), 188 U. S. 321, 355, 47 L. Ed. 492, 500, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561."

This case contains statements to the effect that Congress has the right to follow and confiscate articles prohibited from transportation in interstate commerce, even though mixed with the general mass of the property of the State. The facts in this case show, nevertheless, that the goods were in the original, unbroken packages, in which form Congress clearly had the right to confiscate. But it must be most strongly emphasized that the right to follow such contraband articles after they have become mixed with the general mass of the property in that particular State, and when no longer in the original package, assuming, although this had never been decided, that Congress has the right so to do, does not a *fortiori* give Congress power to punish a person, who holds such articles within that par-

ticular State after such article has been incorporated in the general mass of the property within the particular State, such person having had no part at all in the unlawful importation.

Assuming, for the purpose of argument, that Congress has the power to proceed *in rem* against any particular article, even though within the confines of a State, and after interstate commerce has completely ended, does not mean that Congress can legislate to punish one who merely receives or has in possession such article excluded from interstate commerce, after the importation of such article has ended and when within the confines of a particular State, such person having had no connection with the unlawful importation.

No logical reason can be adduced whereby Congress may be given the right to punish the offender from the right to follow the article *in rem*, assuming again that the right *in rem* exists although this has never been decided beyond the original package doctrine.

In *Savage vs. Jones*, 225 U. S. 501, 56 L. Ed. 1183, the Supreme Court, in another pure food decision, clearly recognizes the limitation of the commerce power of Congress in respect to adulterated foods, in spite of dicta to the contrary therein found.

“This was interstate commerce, in the freedom of which from any unconstitutional burden the complainant had a direct interest. *The protection accorded to this commerce by the Federal Constitution extended to the sale by the receiver of the goods in the original packages.*

Leisy vs. Hardin, 135 U. S. 100, 34 L. Ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Re Rahrer*, 140 U. S. 545, 559, 560; 35 L. Ed. 572, 575, 576, 11 Sup. Ct. Rep. 865; *Plumley vs. Massachusetts*, 155 U. S. 461, 473, 39 L. Ed. 223, 227; 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154; *Vance vs. W. A. Vandercook Co.*, 170 U. S. 438, 444, 445, 42 L. Ed. 1100, 1103, 1104, 18 Sup. Ct. Rep. 674; *Schollenberger vs. Pennsylvania*, 171 U. S. 1, 22-25, 43 L. Ed. 49, 57, 58, 18 Sup. Ct. Rep. 757; *Heyman vs. Southern R. Co.*, 203 U. S. 270, 276, 51 L. Ed. 178, 180, 27 Sup. Ct. Rep. 104, 7 Ann. Cas. 1130."

* * * * *

"The object of the food and drugs Act is to prevent adulteration and misbranding, as therein defined. It prohibits the introduction into any State from any other State 'of any article of food or drugs which is adulterated or misbranded, within the meaning of this Act.' The purpose is to keep such articles 'out of the channels of interstate commerce, or, if they enter such commerce, to condemn them while being transported or when they have reached their destinations. PROVIDED THEY REMAIN UNLOADED, UNSOLD, OR IN ORIGINAL UNBROKEN PACKAGES.' *Hipolite Egg Co. vs. United States*, 220 U. S. 45, 54, 55 L. Ed. 364, 366, 31 Sup. Ct. Rep. 364."

It is singular that the Court in this case, although quoting the *Hipolite Egg Company* case, *supra*, does not quote the dicta of Justice McKenna as to the unlimited power of the Federal Government, but perhaps advisedly quotes that portion of the opinion which is the real opinion in that case, permitting the Federal Government to confiscate the article only in

the original unbroken package, recognizing again the limitation of the Federal commerce power.

In *McDermott vs. Wisconsin*, 228 U. S. 115, 57 L. Ed. 755, the Court held that the State statute which compelled persons within the State to brand and label certain articles in a manner prescribed by the State law, and likewise compelling such persons to remove the Federal label, was an infringement of the commerce power of the Federal Government. The Court said:

“That doctrine referring to the original package doctrine has been many times applied in the decisions of this Court in defining the line of demarcation which shall separate the Federal from the State authority where the sovereign power of the nation or State is involved in dealing with property. AND WHERE IT HAS BEEN FOUND NECESSARY TO DECIDE THE BOUNDARY OF FEDERAL AUTHORITY, IT HAS BEEN GENERALLY HELD THAT, WHERE GOODS PREPARED AND PACKED FOR SHIPMENT IN INTERSTATE COMMERCE ARE TRANSPORTED IN SUCH COMMERCE, AND DELIVERED TO THE CONSIGNEE, AND THE PACKAGE BY HIM SEPARATED INTO ITS COMPONENT PARTS, THE POWER OF FEDERAL REGULATION HAS CEASED AND THAT OF THE STATE MAY BE ASSERTED.

* * * * *

“For, as we have said, keeping within its Constitutional limitations of authority, Congress may determine for itself the character of the means necessary to make its purpose effec-

tual in preventing the shipment in interstate commerce of articles of a harmful character, and to this end may provide the means of inspection, examination, and seizure necessary to enforce the prohibitions of the Act, and when Sec. 2 has been violated, the Federal authority, in enforcing either Sec. 2 or Sec. 10, may follow the adulterated or misbranded article at least to the shelf of the importer.

* * * * *

“To make the provisions of the Act effectual, Congress has provided not only for the seizure of the goods while being actually transported in interstate commerce, but has also provided for such seizure after such transportation and while the goods remain ‘unloaded, unsold, or in original unbroken packages.’ ”

In *Shawnee Milling Company vs. Temple*, 179 Fed. 522, the Court said:

“No one should doubt but that legislation by Congress can control the interstate subject of commerce for a time at least, and then the State by a police regulation can control.”

In *United States vs. Sixty-five Casks of Liquid Extract*, 170 Fed. 455, the Court said:

“Congress had no power except in the District of Columbia and the Territories to prohibit one from manufacturing adulterated food and drug products; it had no power to prevent one anywhere from personally consuming such products; it did have power to suppress the manufacture of such in the District of Columbia and the Territories, and by this Act has done so; it had the further power to restrict in the course

of commerce the transportation from State to State of such products, and it has done so; it had power, after such product was received from another State, to restrict its sale in the original package, and it has done so."

In *Philadelphia Pickling Co. vs. United States*, 202 Fed. 152, the Court said:

"The Act has two clearly separate objects (220 U. S. 54, 31 Sup. Ct. 364, 55 L. Ed. 364): First, to keep adulterated articles completely out of the channels of interstate commerce; and, second, if they do enter such channels, to sanction their condemnation while being transported, or even after they have reached their destination, as long as they remain unloaded, unsold, or in original unbroken packages."

These cases, as stated above, although containing dicta to the effect that Congress has the right to follow the article, irrespective of its incorporation in the general mass of the property of the country, are not cases in which the facts warrant this rule of law, and are all cases which, recognize that Congress has the right to act on interstate commerce only to a certain point. But, assuming that Congress had the right to confiscate the article, it does not necessarily follow, as stated above, that Congress would likewise have the right to punish the offender, for although the articles are excluded from commerce, the person is not. We are, of course, limiting our reasoning to articles incorporated within the general mass of property within any particular State, and after interstate commerce has completely ended, and also

bearing in mind that we are endeavoring to punish the offender who merely knowingly holds such article after incorporation in the general mass of the property within any particular State, having had no connection with the unlawful importation.

Take, for instance, the example of a San Francisco housewife. Adulterated food has been shipped through the mail and is placed upon the shelves of Goldberg, Bowen & Co., of San Francisco, who know it to be adulterated; they sell it to a San Francisco housewife, who likewise knows it to be adulterated; and she uses the food in preparation of the evening meal. Would the United States marshal have the right to come into that woman's home, providing there was a statute to this effect, and arrest her for violating the Federal law because of the fact that she knew that she was using adulterated food? This is what this opium statute amounts to. From none of these pure food cases can this conclusion be derived.

We would call the Court's attention here, without quoting verbatim, to the provisions of the Pure Food Act, Act of June 30, 1906, 34 Stat. at L. 78; section I of said Pure Food and Drug Act, Congress prohibits the sale or manufacture of adulterated food in the District of Columbia, or any territory of the United States, but does not endeavor to legislate in those respects as to any particular State. In Section II and Section X of said Act, Congress enacts that any adulterated food "*which is being transported*" in interstate commerce may be subject to confiscation, and then enacts that "*hav-*

ing been transported” and within any particular State and “*remaining unloaded, unsold or in the original package,*” it is subject to confiscation. Thus it is so palpably obvious that Congress realized that, after the interstate transportation had ended and the food or drug was within the confines of any particular State, there was a limitation upon the power of the Federal authorities and Congress as to that particular food or drug. If this were not true, Congress would have merely stated that these articles “while being transported, or having been transported, through interstate commerce” were subject to the control of the Federal Government. But, as pointed out above, we do not find this broad phrase but, on the other hand, a fine distinction being made by Congress in the Pure Food and Drug Act for the purpose of saving the Act from the condemnation of unconstitutionality, such as caused the Supreme Court to declare the Employers’ Liability Act unconstitutional. To reiterate, Congress distinguishes clearly where the goods are in the course of transportation in interstate commerce, and where they have been transported, and admits, by a qualification of its own power, that where they have been transported and are within any particular State, they are subject to congressional legislation only before incorporation into the general mass of the property of a particular State and before interstate commerce therein has ended. Again, we must emphasize the distinction between the right of Congress to follow an article and to punish the person holding

such contraband article of commerce, within the particular State.

Thus the conclusion is irresistibly borne upon us that the section of the Opium Statute here in question is unconstitutional in that it is an assumption by Congress of the police power reserved to the States, and in that it applies without qualification to both intra- and interstate commerce, and is so interblended in its application to such commerce as to be indivisible. Thus the duty rests upon this court to declare the entire section, herein involved, unconstitutional; but, if the Court should feel this Act not in toto unconstitutional, but only partially so, then this judgment must nevertheless be reversed because the evidence clearly shows that the Act is unconstitutional as to the alleged offense in the indictment.

Once again cautioning the Court to bear in mind that the right to follow the opium, after its identity has been lost in the general mass of the property of the State (although the Supreme Court of the United States has never given Congress this right), has no bearing upon the right of Congress to legislate against persons merely holding such goods within the confines of the State, after the transportation in interstate or foreign commerce has completely ended, and where the person holding such opium is in no wise connected with the unlawful importation thereof. The mere fact of the knowledge of such unlawful importation is insufficient to create jurisdiction where, without such knowledge, Con-

gress under the Constitution would have no such power.

WHEREFORE, Plaintiff in Error, because of prejudicial error appearing in the record, asks this prejudicial error appearing in the record, asks that the judgment be reversed.

Respectfully submitted,

PHILIP S. EHRLICH,
Attorney for Plaintiff-in-Error.

No. 2444.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

MAX STEINFELDT,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Reply Brief of Defendant in Error.

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Filed this day of November, 1914.

FRANK D. MONCKTON, Clerk.

By Deputy Clerk.

Filed

NOV 25 1914

F. D. Monckton,

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT
DISTRICT OF CALIFORNIA.

MAX STEINFELDT,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

} No. 2444.

REPLY BRIEF OF DEFENDANT IN ERROR.

I.

There can be no dispute as to the facts of this case. The plaintiff in error, Steinfeldt, is shown to have had possession of smoking opium in San Francisco, knowing the same to have been smuggled unlawfully into the United States. He is not found to have had anything to do with the original entry of the contraband into the United States.

II.

THE ISSUES

Appellant attacks the last portion of Section 2 of the Act of February 9th, 1909, 35 Stat. L., 614, on the ground that it is unconstitutional in that it is an exercise by Congress or the Federal government of the police power reserved to the States. Appellant concedes that the first portion of Section 2 is undoubtedly constitutional. This portion reads as follows:

“SEC. 2. (PENALTY FOR VIOLATION—POSSESSION, PROOF OF GUILT.) That if any person shall fraudulently, or knowingly import or bring into the United States, or assist in so doing, any opium or any preparation or derivative thereof contrary to law,”

It is claimed, however, that the concluding portion of the section is an infringement upon the States' police power and is therefore unconstitutional.

“or shall receive, conceal, buy, sell or in any manner facilitate the transportation, concealment, or sale of such opium or preparation or derivative thereof after importation, knowing the same to have been imported contrary to law, such opium or preparation or derivative thereof shall be forfeited and shall be destroyed, and the offender shall be fined in any sum not exceeding five thousand dollars nor less than fifty dollars, or by imprisonment for any time not exceeding two years, or both.”

In other words, it is claimed that if A smuggles smoking opium into the United States and is apprehended, any punishment meted out to him under this section is constitutional. The point appellant makes is that should A smuggle opium into the United States and then pass it to B who takes it, knowing the same to have entered unlawfully, Federal jurisdiction has ceased and the prosecution of B is unconstitutional. If B passed it to C who in turn passed it to D, each taking knowingly, that these parties are outside the pale of the law. It is claimed that with the passing of the opium to B, C or D that it has lost its identity as an article of foreign commerce and has become mixed with the taxable property of the State, and that any attempt to hold B, C or D is a usurpation of the police power of the State to regulate the public health, morals and social welfare of the citizens of the State. It is further contended as a basis for these assumptions that the opium law comes within the delegated powers to the Federal government under the commerce clause, Section 8, Article 3 of the Constitution, and not under the Customs clause, Section 8, Article 1 of the Constitution. With this false premise adopted by appellant the Government cannot agree. However, it will be the purpose of the Government to discuss this question under both clauses of the Constitution. First, it will be shown in this brief that the regulation of the customs pertains thereto and is a matter for the customs officials of the Treasury Department. Then,

conceding that the prohibition of smoking opium by Congress is a regulation of commerce under Section 8, Article 3 of the Constitution, nevertheless the Federal Government may pursue and seize any opium which violates the provision of a commerce regulation and prosecute an offender who knows that such opium has come into the country contrary to the prohibitions of a commerce law. These two phases of the question will be taken up in the order here indicated.

III.

CUSTOMS CLAUSE OR COMMERCE CLAUSE.

To prove to this Court that the opium law does not come under the rules governing the shipment of merchandise in foreign commerce, or that there is an infringement on the police power of the States, the appellee will show that the clause of the Constitution giving Congress the power to regulate customs and imposts governs, and not the commerce clause.

Section 8, Article 1 of the United States Constitution reads as follows:

"The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States."

The article giving power to regulate commerce reads:

"3. To regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

The clause giving power to enact laws to enforce the delegated powers is here set forth:

"18. *To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or office thereof.*"

It is the Government's contention that the Act of February 9, 1909, was enacted under and by virtue of Articles 1 and 18 above set forth and not with reference to Article 3. Appellant claims that if the objectionable part of the opium law came under customs or revenue then they would concede its constitutionality. They admit that it is a most important distinction yet they pass over it most lightly.

The following is quoted from page 14 of appellant's brief:

"Admittedly, if this was an exercise of the revenue law, and an attempt to collect duty upon imports—in other words, if Congress was acting in an endeavor to enforce the revenue statutes—the act would be clearly constitutional; but there is not the slightest question here but that the act referred to is not passed under the guise of an endeavor to aid the collection of revenue, which it

must be conceded the United States has the right to do, or of any of the constitutional powers of Congress."

This explanation slides so easily over this important distinction. With this mere assertion the appellee cannot agree. The regulation of importation of smoking opium has always been under the revenue and customs laws and under the direct supervision of the Treasury Department. By no stretch of the imagination can its regulation be placed under the Department of Commerce.

The first statute under which unlawful importations of opium were prosecuted is Section 3082 of the Revised Statutes, the Act of March 2, 1799, as amended July 18, 1866. It will be noted that the wording is almost identical with that portion of Section 2 of Act of 1909 to which the appellant objects.

"Sec. 3082. (Concealing or buying goods liable to seizure.) If any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any merchandise, contrary to law, *or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported contrary to law*, such merchandise shall be forfeited, and the offender shall be fined in any sum not exceeding five thousand dollars nor less than fifty dollars, or be imprisoned for any time not exceeding two years, or both. Whenever, on trial for a violation of this section, the defendant is shown to have or to have had possession of such goods, such

possession shall be deemed evidence sufficient to authorize conviction, unless the defendant shall explain the possession to the satisfaction of the jury. (R. S.).”

Under the provisions of the law smoking opium came into the United States upon the payment of a duty along with the dutiable merchandise. There were many prosecutions under this law for smuggling smoking opium into the country without paying the duty, a few of which are here set forth:

U. S. v. Dunbar, 60 Fed., 75;

U. S. v. Dunbar, 156 U. S., 185;

U. S. v. Gardiner, 42 Fed., 832.

U. S. v. Kee Ho, 33 Fed., 333.

The next legislation on the importation of opium was the Act of February 23rd, 1887, 210 Stat. L., 409:

“(Sec. 1.) (Importation of opium by Chinese prohibited.)”

“Sec. 2 (Forfeiture).”

“Sec. 3. (Citizens of United States prohibited from traffic in opium in China—punishment—jurisdiction—forfeiture.)”

This statute did not repeal Sec. 3082, R. S., above quoted.

By the Act of July 24, 1897, an act to provide revenue for the Government and to encourage the industries of the United States (30 Stat., 151), smoking opium was still regulated by the Treasury Depart-

ment under the title of Duties and Customs. Section 43 of Schedule A of that act reads as follows:

“Opium, crude or unmanufactured, and not adulterated, containing nine per centum and over of morphia, one dollar per pound; morphia or morphine, sulphate of, and all alkaloids or salts of opium, one dollar per ounce; aqueous extract of opium, for medicinal uses, and tincture of, as laudanum, and other liquid preparations of opium, not specially provided for in this Act, forty per centum ad valorem; opium containing less than nine per centum of morphia, *and opium prepared for smoking, six dollars per pound; but opium prepared for smoking and other preparations of opium, deposited in bonded warehouses shall not be removed therefrom without payment of duties, and such duties shall not be refunded.*”

From this it will be seen that smoking opium was still entering the United States upon the payment of a duty of six dollars a pound. Violations of this law were prosecuted under Sec. 3082, R. S.

In 1909 the opium law under which appellant was prosecuted was enacted.

“An act to prohibit the importation and use of opium for other than medicinal purposes.”

(Act of Feb. 9, 1909, ch. 100, 35 Stat. L. 614).

“(Sec. 1.) (Opium—importation prohibited.) That after the first day of April, nineteen hundred and nine, it shall be unlawful to import into the United States opium in any form or any preparation or derivative thereof; provided, that opium

and preparations and derivatives thereof, other than smoking opium or opium prepared for smoking, may be imported for medicinal purposes only, *under regulations which the Secretary of the Treasury is hereby authorized to prescribe*, and when so imported shall be subject to the duties which are now or may hereafter be imposed by law (35 Stat. L., 614).

"Sec. 2. (Penalty for violation—possession, proof of guilt.) That if any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any opium or any preparation or derivative thereof contrary to law, *or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such opium or preparation or derivative thereof after importation, knowing the same to have been imported contrary to law, such opium or preparation or derivative thereof shall be forfeited and shall be destroyed, etc.*"

It should be noted that the Treasury Department under these provisions must inspect all opium to see whether or not it is smoking opium or opium for medicinal purposes. It is still under the classification of customs duties.

In 1913 Congress again legislated in reference to smoking opium in providing for the revenue. In the Act of October 3rd, 1913, under Chapter 16, "an act to reduce tariff duties and to provide revenue for the Government, and for other purposes," the Act of 1909 was reaffirmed. The revenue schedule fixing the duty on opium for medicinal purposes reads as follows:

"Opium, crude or manufactured, and not adul-

terated, containing 9 per centum and over of morphia, \$3 per pound; opium of the same composition, dried to contain 15 per centum or less of moisture, . . . *provided, that nothing herein contained shall be construed as to repeal or in any manner impair or affect the provisions of an Act entitled 'An Act to prohibit the importation and use of opium for other than medicinal purposes,' approved February ninth, nineteen hundred and nine."*

Reasoning from these statutes the Government contends that by no possible reasoning can it be presumed that smoking opium was to be supervised by any other department than the Treasury Department and that whether coming in under a duty or prohibited absolutely it is a matter of customs regulation. Smoking opium and opium for medicinal purposes at one time both came into the United States by paying a duty. Gradually the duty was raised on smoking opium and eventually it was barred out of the country. Opium for medicinal purposes still comes into the country upon paying the revenue, yet is it reasonable to say as appellant now does, that the handling of smoking opium in the United States comes under the provisions and rules of the commerce clause, but that opium for medicinal purposes does not? It can not be said that since there is no revenue now upon smoking opium that it is no longer under customs regulations. The payment of or the non-payment of revenue should not be the criterion. Whether an article enters the United States free of duty or upon

payment of a revenue or is absolutely prohibited the customs officials must inspect it. They must view all opium to see whether or not it is medicinal opium to be allowed to enter or smoking opium to be prevented from coming in. Even though smoking opium is not on the schedule the requirements of the revenue laws are plain, as District Judge Ray said in the customs case of *U. S. v. Fifty Waltham Watch Movements*, 139 Fed., 291, 298:

“Goods entitled to come in free are imported as much as those which pay duty. The requirement of law is as positive that the one class shall come in through the custom houses as that the other shall. This is the policy of the Government in the enforcement of its laws, in the collection of its revenues, in the protection of its interests.”

IV.

POWER BY REASONABLE AND PROPER LAWS FOR ENFORCING EITHER THE CUSTOMS REGULATIONS OR FOREIGN COMMERCE.

Section 8, Article 18 of the Federal Constitution, states that Congress shall have power

“To make all laws which shall be necessary and proper for carrying into execution the foregoing powers.”

If Congress can impose heavy duties or put up a bar against any article, certainly it must have the means of enforcing such a law. A law without the

necessary penalties to make it valid would be absurd indeed. Now, the appellant maintains that if A brings smoking opium into the country the customs officials may apprehend him, cause a forfeiture of the opium and prosecute him criminally. He has no fault to find with the law thus far. The grievance against the law is in case A passes the opium to B, who takes possession of same, knowing that it has been unlawfully imported. He contends that any procedure against B is unconstitutional in that it violates the State's right of police power to regulate the health, morals and social welfare. It is indeed astounding that when Congress is given the right to make "reasonable" laws for enforcing the customs regulations that it can only go thus far and must then stop. Is Congress only allowed to take out one bite of the cherry and leave the remainder? It must be conceded that B taking possession, knowingly, is an accessory after the fact. He is aiding and abetting A in the unlawful importation, yet appellant says you may take the one but you must leave the other. One might expect the argument from counsel for appellant, that if A stole government property on the United States Military Reservation, the Presidio, and carried it off the Presidio where he sold it to B, who took it knowingly, that B could not be prosecuted by the Government in the Federal Courts for receiving stolen government goods.

If in the case of the opium A brought it into the

country and it passed through twenty hands and the twentieth received and concealed the opium, knowing it to have been unlawfully imported, he is an accessory after the fact. The opium was never lawfully in the country because of the clandestine handling, and the evasion of the prohibition. When second and third parties received and concealed smoking opium after importation under the old statute, Sec. 3082, R. S., above quoted, they were prosecuted. By what logic is it decided that since smoking opium has been prohibited under the Act of 1909 that these accessories after the fact who receive smoking opium after its importation cannot be prosecuted?

A case most emphatically deciding this point in an indictment for receiving and concealing smoking opium under the statute, Sec. 3082, R. S., is the case of *United States v. Kee Ho*, 33 Fed., 333, 334, 335. Judge Deady said:

"The section of the statute under which this indictment is drawn is intended, as the title of the Act from which it is compiled indicates, to prevent smuggling—the clandestine introduction of goods into the United States without passing them through the custom house, and with intent to defraud the revenue of the United States. *But its language is broad enough to include, and does include, every case or form of illegal importation, even where the intent to avoid the payment of duties does not exist, as the bringing in of prohibited goods, or goods packed in prohibited methods.*"

"In a count charging the *secondary offense of buying or receiving goods* imported contrary to law, it is not necessary to describe the original offense with the same particularity of time, place, and circumstances that is required in a count for such original offense. *The rule in the case of an indictment for receiving stolen goods furnishes a safe analogy. In such case it is not necessary to name the thief, nor to allege his conviction, nor to state the time and place when and where the goods were stolen; and, generally, it is sufficient to describe the goods, state their value, and allege that before the receipt thereof by the defendant, they had been stolen or feloniously taken and carried away. U. S. v. Claflin, 13 Blatchf., 184; 1 Whart. Crim. Law, Pars. 997-1004.*"

The opinion holds that even in a case where smoking opium might be absolutely prohibited from entering the country and where there was no fixed duty that the statute, Sec. 3082, R. S., was broad enough to cover the offense. The decision in that case further holds that the person receiving or concealing smoking opium is in the same position as one who receives stolen goods knowing the same to be stolen.

As further authorities for the holding that those who receive and conceal, knowing that an article has been unlawfully imported by another, may be prosecuted, the following cases are cited:

U. S. v. Merriam, 26 Fed. Cas., 1237, No. 15,759.

U. S. v. A Lot of Jewelry, 59 Fed., 684, 687.

THE OPIUM LAW A REGULATION OF FOREIGN COMMERCE.

Under another heading in this brief the contention was advanced that the prohibition of smoking opium from the United States was a matter of customs regulation under the revenue clause of the Constitution. Now conceding and assuming that the enactment of this law by Congress was an exercise of its Constitutional powers under the commerce clause, the arguments for its enforcement under that provision of the Constitution will be advanced. If it is conceded that the opium law is a regulation of commerce the power to enact reasonable and necessary laws for its enforcement under and by virtue of Section 8, Article 18 of the Constitution, applies with the same force as it does to the enforcement of any customs law. An enumerated power is "distinct and independent to be exercised in any case whatever."

M'Culloch v. Maryland, 4 Wheat. 421, 422; 4 L. Ed., 605.

Doyle v. Continental Insurance Co., 94 U. S., 535, 541; 24 L. Ed., 148, 152.

The Supreme Court has also most emphatically decided that the power to regulate commerce em-

braces the power to prohibit certain articles from commerce.

U. S. v. Marigold, 9 How., 560, 566; 13 L. Ed., 257.

Butterfield v. Stranahan, 192 U. S., 470, 493; 48 L. Ed., 525.

Lottery Case, 188 U. S., 321; 47 L. Ed., 492.

If the opium law is a commerce regulation it is only a regulation of foreign commerce and not of interstate. The very wording of the statute makes that limitation in that it states "shall fraudulently or knowingly *import or bring into the United States*." Whether or not this is a valid distinction is not easily determined but it should be borne in mind that most all the cases cited by appellant are cases dealing with *interstate* commerce as distinguished from *foreign* commerce. The opium law has nothing to do with interstate commerce. Might it not be held that Congress has greater powers in dealing with articles which are of foreign origin and are coming into the United States than in the matter of commodities of trade shipped from one state into another?

If it is taken for granted that the opium law is a regulation of foreign commerce the question to be determined is, may the Federal Government come within the confines of the state to enforce the law? In other words, where Congress has regulated an article of foreign commerce in absolutely prohibiting

its importation into the United States, may the arm of the Government reach out to prosecute an offender who has no connection with the foreign commerce in the article, but simply took it knowingly from the importer?

To deny the Government this power appellant cites many cases on interstate commerce which support the "broken package rule" and "the end of transit rule." With these authorities and these rules we have no quarrel. They are thoroughly established. They hold that where an article has been shipped in interstate commerce, transit ended and the original package broken, the commerce in the article has ceased and it then comes under the supervision of the state. The article at that time is mixed with the mass of property of the state and is subject to its taxes. Is a can of smoking opium an article regulated by this rule? Congress has declared that smoking opium shall not enter into commerce. There are no qualifications. There is no question of adulteration, impurity or misbranding. There is no remedy or anything left undone which may be rectified and thereby make it fit to go into commerce. It is a thing excluded, prohibited and barred out without any exceptions. If it ever comes into the United States its entry is clandestine, in violation of the law and by smuggling. Wherever it may be found it is contraband. It is an outlaw. Its commerce could not start nor could it have any end. The broken package rule or end of transit rule

never had any relation to it. At no time is it mixed with the mass of property of the state so that it might be taxed. It is not an article taxable by the state.

Has Congress the power to pursue contraband opium within the confines of the state and prosecute those offenders who deal in this opium knowing that its importation was a violation of the Federal law? If Congress has no means or machinery to prevent importation, the mere fact that it has a law prohibiting the importation of opium would be almost useless and vain.

In *Gibbons v. Ogden*, 9 Wheat., 1, 195; 6 L. Ed., 23, there is the following statement:

"In regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several States. It would be a very useless power if it could not pass those lines. The commerce of the United States with foreign nations is that of the whole United States; every district has a right to participate in it. The deep streams which penetrate our country in every direction, pass through the interior of almost every State in the Union, and furnish the means of exercising this right. If Congress has the power to regulate it, that power must be exercised whenever the subject exists."

The case of *Gilman v. Philadelphia*, 2 Wall., 713, 725, 18 L. Ed., 96, also defines the power of Congress in going within the States to regulate foreign commerce:

"Commerce among the States' does not stop at a State line. Coming from abroad it penetrates

wherever it can find navigable waters reaching from without into the interior, and may follow them up as far as navigation is practicable. *Wherever 'commerce among the States' goes, the power of the Nation, as represented in this Court, goes with it to protect and enforce its rights."*

The case of *United States v. Gould*, No. 15,239, 25 Federal Cases 1375, quoted at some length on pages 17 and 18 of appellant's brief, needs careful scrutiny. It is proper to "call the attention" of this Court to the fact that that case was a decision by the District Court of Alabama in 1860 just at the time when the legality of the slave trade was a much debated question. It was a matter of much factional discussion. Appellant claims that in that case the District Court held that any second party other than the original importer who brought the slave into the State could not be prosecuted under the Federal law and that such prosecution of a second party was unconstitutional. Judge Jones in that case was not so emphatic as would seem from the paragraph quoted by appellant and it will be seen that he made many qualifying statements. In addition to what counsel for appellant has incorporated in his brief, the following is quoted:

"Looking, then, to the mischief intended to be remedied, and to the nature, extent and limits of the constitutional grant of power over this subject, I think the proper construction of the law is, that it embraces and provides for the punishment *of every person who, in any manner, directly or indirectly, participates, aids or abets in the im-*

portation of negroes as slaves. The capitalist who furnishes the money—the agents who build, charter or fit out a slave ship—the officers and crew who navigate it—those who procure the cargo, or who receive the negroes when landed, or carry them into the interior, or hold, sell or otherwise dispose of them there, for the importer—are all participants in the unlawful importation and guilty of an offense against the constitutional laws of the United States, and punishable under those laws. But after such a negro has passed out of the possession or control of the importer and his agents and employees, and has become mingled with the inhabitants of Alabama, if any person beats, murders, or otherwise criminally violates his rights, in this State, the offender is liable to indictment under the State law, and before the State tribunals alone. Whilst, as judge of this Court, I shall always be ready and willing to maintain and enforce this, and all other constitutional powers and laws of the general government, it is equally my duty not to go beyond the limits of the Constitution, or to encroach, in the slightest degree, upon the rights and jurisdiction of the States.”

The clean-cut distinction to be drawn between this case and the one at bar is the wording of the indictments of each. The indictment in *U. S. v. Gould, supra*, did not charge that the defendant held the slave knowing her to have been unlawfully imported, but simply charged that defendant did unlawfully and knowingly hold said negro “then and there unlawfully brought in as aforesaid.” In view of the above quoted dicta the district judge might have made a

different ruling had the indictment been worded in the form of the opium indictment in this case.

On page 43 of brief for appellant, counsel quotes at some length the case of *Hypolite Egg Company v. United States*, 220 U. S., 45, 55 L. Ed., 365, with a comment on the "broken package" rule. What the Government considers the most important part of the opinion in that case is quoted as follows:

"It is clearly the purpose of the statute that they shall not be stealthily put into interstate commerce and be stealthily taken out again upon arriving at their destination, and be given asylum in the mass of property of the State. Certainly not, when they are yet in the condition in which they were transported to the State, or, to use the words of the statute, while they remain 'in the original, unbroken packages.' *In that condition they carry their own identification as contraband of law. Whether they might be pursued beyond the original package we are not called upon to say. That far the statute pursues them, and, we think, legally pursues them, and to demonstrate this but little discussion is necessary.*

.

In other words, the contention attempts to apply to articles of *illegitimate* commerce the rule which marks the line between the exercise of Federal power and State power over articles of *legitimate* commerce. The contention misses the question in the case. *There is here no conflict of National and State jurisdictions over property legally articles of trade. The question here is whether articles which are outlaws of commerce may be seized wherever found; and it certainly will not be contended that they are outside of the jurisdiction of the National*

Government when they are within the borders of a State. The question in the case, therefore, is, What power has Congress over such articles? Can they escape the consequences of their illegal transportation by being mingled at the place of destination with other property? To give them such immunity would defeat, in many cases, the provision for their confiscation, and their confiscation or destruction is the especial concern of the law."

In this decision there is a clear distinction between legitimate and illegitimate articles of commerce and the emphatic statement that outlaws of commerce or contraband may be seized wherever they may be found. Counsel for appellant in his brief states that conceding and assuming that Congress has the power to confiscate smoking opium even though it may be in the hands of second and third parties and mixed with the general mass of property of the state, that this does not *a fortiori* give Congress the power to also punish the person who has possession. Let us follow appellant's contention out to its logical conclusion. Conceding that the Government may punish A who brings the opium into the United States, they maintain that B and C who purchase from A, knowing the opium to be an outlaw import, cannot be prosecuted. If that is the interpretation of the law B may put up electric sign boards on Market street in this city with the announcement, "Smugglers, bring me your outlaw contraband smoking opium. I will pay \$50 a can for it. I will protect any confidences. Upon advice of legal counsel, Philip S. Ehrlich, I

"am informed that I am immune from prosecution "by the Federal Government." Is not B in the same position as the person receiving the stolen goods knowing them to have been stolen? Is he not an accessory after the fact? Is he not encouraging the unlawful importation of smoking opium? Is he not aiding, abetting and doing acts in furtherance of the importation? If you grant the Government the power to only punish A but not B, then you are not allowing to Congress the "reasonable and necessary laws" to regulate foreign commerce.

The case of *Savage v. Jones*, 225 U. S., 501, 56 L. Ed., 1183, quoted by appellant, is entirely beside the mark in this discussion. That decision merely held that the State might exercise its police power since it did not conflict with the authority of the Federal Government. In the conclusion of his opinion in that case Justice Hughes said:

"That state has determined that it is necessary, in order to secure proper protection from deception, that purchasers of the described feeding stuffs should be suitably informed of what they are buying, and has made reasonable provision for disclosure of ingredients by certificate and label, and for inspection and analysis. The requirements, the enforcement of which the bill seeks to enjoin, are not in any way in conflict with the provisions of the Federal act. They must be sustained without impairing in the slightest degree its operation and effect. *There is no question here of conflicting standards, or of opposition of State to Federal*

authority. It follows that the complainant's bill in this aspect of the case was without equity."

Counsel for appellant has quoted extensively from *Champion v. Ames*, 188 U. S., 321, 47 L. Ed., 492, the Lottery case, but he fails to set forth that portion of Justice Holmes' opinion which holds that not only may Congress prohibit lottery tickets from interstate commerce, but it may use all power consistent with the Constitution to drive the traffic out of commerce among the states:

"We have said that the carrying from state to state of lottery tickets constitutes interstate commerce, and that the regulation of such commerce is within the power of Congress under the Constitution. Are we prepared to say that a provision which is, in effect, a prohibition of the carriage of such articles from state to state is not a fit or appropriate mode for the regulation of that particular kind of commerce? If lottery traffic, carried on through interstate commerce, is a matter of which Congress may take cognizance and over which its power may be exerted, can it be possible that it must tolerate the traffic, and simply regulate the manner in which it may be carried on? *Or may not Congress for the protection of the people of all the states, and under the power to regulate interstate commerce, devise such means, within the scope of the Constitution, and not prohibited by it, as will drive that traffic out of commerce among the states?"*

If the "broken package" rule and the "end of transit rule" apply to smoking opium why would it not also apply to an interstate commerce shipment of

counterfeit bills? Counterfeit money has also been absolutely prohibited from shipment between the States. *U. S. v. Marigold*, 9 Howard, 560, 566, 13 L. Ed., 257. Suppose A imports from Oregon to San Francisco, Cal., a box containing several hundred counterfeit bills. He sells them to B who breaks open the box and takes the counterfeit bills, knowing of the unlawful importation and with the intent to deceive. Is it not absurd to say that since the bills are now mixed with the general mass of property of the State and commerce has ended, the Federal Government must keep its hands off and leave it to the State to prosecute B? Such a result would make a farce of our Government.

There has been some attempt to confuse the pure food laws and the pure food cases with the opium law. Pure food legislation comes under an entirely different regulation from the contraband law. It does not deal with a thing *malum in se*, an outlaw of commerce. With great relish, counsel for appellant has cited the instance of the housewife who knowingly purchases adulterated food and asks if she should be punished. Congress has seen fit to enact a pure food law which will only hold the original importer liable. Perhaps that was all that was "*reasonable and necessary*" in these cases to stamp out such commerce. Suppose, however, Congress had found it "*reasonable and necessary*" to pass a pure food law with reference to certain articles which would read like the opium

statute under discussion, or to make it more plain, let us suppose that the words "jam made of coal tar" should be substituted for the words "smoking opium" in the opium statute. If this same housewife who conducts a boarding house should go to these same importers, Goldberg, Bowen & Co., and request that a case of their contraband, outlaw, coal tar jam, smuggled from Australia, be sent up to her home, would she not be in the same position as appellant Steinfeldt? If she knowingly began to feed this deleterious substance to her boarders should she not be prosecuted under such a law for knowingly dealing with this contraband?

VI.

THE CASE OF UNITED STATES v. KELLER IS NOT IN POINT.

Appellant bases his whole contention in this brief upon the case of *United States v. Keller*, 213 U. S., 138, 53 L. ed., 737, maintaining that the decision of the Supreme Court in that case which determines that the law was an infringement upon the police power of the State is particularly analogous to the second portion of Section 2 of the opium law. In noting distinctions between that case and the case at bar, it will be first seen that the Keller case was a case arising under the immigration laws which were enforced at that time by the Department of Commerce and Labor, but since which time are now under the new Department of Labor, whereas opium laws are under the

supervision of the Department of Treasury in dealing with the customs.

Appellant places Section 3 of the Immigration Rules and Regulations beside the Act of February 9, 1909, and contends they are directly analogous in their terms; however, he endeavors to pass over one obvious and important point, namely, that in the one law there is the charge that the defendant knew of the unlawful importation whereas in the other there is no such provision. That portion of the opium law in question reads as follows:

“Or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such opium or preparation or derivative thereof after importation, *knowing the same to have been imported contrary to law, such opium or preparation or derivative thereof.*”

That portion of Section 3, the provisions of which was held unconstitutional by the Supreme Court, *U. S. v. Keller, supra*, is herewith set forth:

“Or whoever shall keep, maintain, control, support or harbor in any house or other place for the purpose of prostitution, or for any other immoral purpose, any alien woman or girl, within three years after she shall have entered the United States, shall, in every case, be deemed guilty of a felony.”

This provision of the immigration law does not hold that there should be any attempt whatsoever to punish a person for aiding in the unlawful importation or being an accessory after the fact. The statute

does not say that any act done by the defendant in aiding or bringing about any unlawful importation shall be punishable. That statute simply says any one who shall deal with such an alien prostitute shall be liable to the penalties therein provided. Certainly it would be unconstitutional for the Federal Government to attempt to interfere with the police powers of the State in a matter of social welfare, the health or morals of the State. However, Section 3 of the Immigration Rules and Regulations has, since the decision in the Keller case, been amended, and it now reads with such additions to its provisions as to make any one liable who furthers any unlawful importation, knowing such to be contrary to law.

That portion of Section 3 of the Immigration Rules and Regulations as amended by the Act of March 26, 1910, reads as follows:

“Or whoever shall hold or attempt to hold any alien for any such purpose *in pursuance of such illegal importation*, or whoever shall keep, maintain, control, support, employ, or harbor in any house or other place, for the purpose of prostitution or for any other immoral purpose, *in pursuance of such illegal importation*, any alien, shall, in every such case be deemed guilty of a felony.”

The attention of the Court is called to the words “in pursuance of such illegal importation,” which occurs twice in that portion of the statute just quoted; should the same state of facts as in the Keller case arise at the present time under this amended law the

Supreme Court would have no ground for holding that such prosecution was unconstitutional since any act which would be committed by the defendant would be in *pursuance of the original illegal importation, knowing of such unlawful entry*. Surely any person furthering the original act of the illegal importing is an accessory after the fact; so also in the case of receiving and concealing opium in the United States after importation, knowing the same to have been unlawfully imported.

When the case of *Zakonaite v. Wolf*, 226 U. S., 272, 57 L. ed., 219, was decided by the Supreme Court, section 3 of the Immigration Rules and Regulations as amended and quoted above was then in force. In the deportation of an alien prostitute in that case the question of the State's police power was also raised. Although the facts of the case were not analogous to those of *U. S. v. Keller, supra*, it was cited in the brief of appellant on the point of police power. In most emphatically deciding the constitutionality of Section 3 of the Immigration Rules and Regulations Justice Pitney said:

"The appellant raises some other constitutional objections, viz: *that the immigration act vests in the Federal authorities the power to try an immigrant for a violation of the penal laws of the State of which he has become a resident, and so interferes with the police power of the State; that the act vests judicial powers in an executive branch of the Government; that it violates the constitutional*

guaranty of the privilege of the writ of habeas corpus, and the like. *These are without substance, and require no discussion.* Final order affirmed."

The mere fact that the having in possession smoking opium by appellant Steinfeldt was a violation of the California State Poison Law as well as a violation of the Federal Customs Law should not deny the Government of its jurisdiction to mete out punishment for the Federal offense. There is nothing antagonistic or conflicting in the existence of dual punishments for the same acts, *inasmuch as they constitute two distinct offenses*, the one against the State government, and the other against the National Government; and the right of each of these two governments to inflict punishment for the same act has repeatedly been recognized by the courts.

Moore v. Illinois, 14 How., 14, 20, 14 L. ed., 306, 309;

Coleman v. Tennessee, 97 U. S., 509, 24 L. ed., 1118;

Grafton v. United States, 206 U. S., 333, 354, 51 L. ed., 1084, 1091, 27 Sup. Ct. Rep., 749, 11 A. & E.

The Supreme Court of the United States also recognized this point in *Bugajewitz v. Adams*, 228 U. S., 584, 57 L. ed., 979. That was also a case of the deportation of an alien prostitute under Section 3 of the Immigration Laws and Regulations. It held that

the fact that the State had enacted certain laws under its police powers did not interfere with the enforcement of the Immigration Law. Justice Holmes said:

"The attempt to reopen the constitutional question must fail. It is thoroughly established that Congress has power to order the deportation of aliens whose presence in the country it deems hurtful. The determination by facts that might constitute a crime under local law is not a conviction of crime, nor is the deportation a punishment; it is simply a refusal by the Government to harbor persons whom it does not want. *The coincidence of the local penal law with the policy of Congress is an accident.*"

VII.

The Government submits:

(1) That the regulation of the importation of smoking opium is a matter within the authority of the Treasury Department of the United States and is a customs regulation even though there is no import duty and the article is absolutely prohibited.

(2) That, if the prohibition of smoking opium from the United States is a regulation of foreign commerce, Congress has power to go within the State to seize any contraband or outlaw of commerce and punish the person who having knowledge of the unlawful importation, receives and conceals the same. The broken package rule and the end of transit rule have no application to the opium law which prohibits

opium from all commerce and makes it an outlaw wherever it is found.

(3) That the Constitution in conferring upon Congress the authority to make laws reasonable and necessary for the enforcement of the delegated powers enumerated in Section 8 of the Constitution cannot be construed to mean that these powers should be restricted in any absurd way.

Respectfully submitted.

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4
No. 2444

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT, DISTRICT
OF CALIFORNIA.

MAX STEINFELDT,

Plaintiff in Error,

VS.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Reply Brief of Plaintiff in Error

P. S. EHRLICH,

Attorney for Plaintiff in Error.

Filed this _____ day of December, A. D., 1914

FRANK D. MONCKTON, Clerk.

By _____ Deputy Clerk.

THE TEN BOSCH COMPANY, SAN FRANCISCO

Filed

DEC - 3 1914

F. D. Monckton,

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT, DISTRICT
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| MAX STEINFELDT, | } | No. 2444. |
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| THE UNITED STATES OF AMERICA, | | |
| <i>Defendant in Error.</i> | | |

REPLY BRIEF OF APPELLANT IN ERROR.

Counsel for the defendant in error seems to have no understanding of what is meant by the words in the statute “after importation.” His idea of importation is similar to a rubber band. It may be stretched to meet the exigencies of the case. Without burdening this Court with long citations, we would merely call the Court’s attention to plaintiff in error’s open-

ing brief, page 9, and the case of *U. S. vs. Caminetti*, 194 Federal 905, where it is distinctly held that the act of importation is complete as soon as the article is within the three mile limit.

Counsel for defendant in error, in his brief, contends further that the opium statute is a valid exercise of the power of Congress to collect revenue, and should be sustained as a revenue statute.

As was suggested by the Court in the oral argument, we need only reply that the opium statute on its very face refutes this argument. There is a direct prohibition against the importation of any and all opium, and then a proviso that opium for medicinal purposes alone may be imported. A revenue measure is never an exclusionary measure.

In this connection, we call the Court's particular attention to the case of *In re Heff*, 49 L. Ed. 848, quoted in our opening brief, and to the case of *United States vs. Dewitt*, 19 L. Ed. 594, in which a section of the Internal Revenue Act, seeking to make it a crime to mix for sale certain oils under a certain degree of temperature, was held unconstitutional insofar as it operated within the limits of any particular State. In the course of the argument it was urged that since the section was found in the Internal Revenue Act, it was a revenue measure. Similar reasoning was used on the oral argument in the case at bar. We quote from the decision of the Court as follows:

“The record shows an indictment against the defendant under the 29th section of the Internal

Revenue Act of March 2, 1867 (14 Stat. at L., 484), which makes it a misdemeanor, punishable by fine and imprisonment, to mix for sale naphtha and illuminating oils, or to sell or offer such mixture for sale or to sell or offer for sale oil made of petroleum for illuminating purposes, inflammable at less temperature than 110 degrees Fahrenheit. The offense charged was offering for sale oil made of petroleum of the description specified in the statute, at Detroit, Michigan.

* * * * *

“The first of these questions relates exclusively to the case made by the indictment. The fact charged was a sale of a particular description of illuminating oil within the limits of a State. There was no allegation that the sale was in violation or evasion of any tax imposed on the property sold. It was alleged only that the sale was made contrary to the statute.

“The question certified resolves itself into this: Has Congress power, under the Constitution, to prohibit trade within the limits of a State?

“That Congress has power to regulate commerce with foreign nations and among the several States, and with the Indian tribes, the Constitution expressly declares. But this express grant of power to regulate commerce among the States has always been understood as limited by its terms; and as a virtual denial of any power to interfere with the internal trade and business of the separate States; except, indeed, as a necessary and proper means for carrying into execution some other power expressly granted or vested.

“It has been urged in argument that the provision under which this indictment was framed

is within this exception; that the prohibition of the sale of the illuminating oil described in the indictment was in aid and support of the internal revenue tax imposed on other illuminating oils. And we have been referred to provisions, supposed to be analogous, regulating the business of distilling liquors, and the mode of packing various manufactured articles; but the analogy appears to fail at the essential point, for the regulations referred to are restricted to the very articles which are the subject of taxation, and are plainly adapted to secure the collection of the tax imposed; while, in the case before us, no tax is imposed on the oils the sale of which is prohibited. If the prohibition, therefore, has any relation to taxation at all, it is merely that of increasing the production and sale of other oils and, consequently, the revenue derived from them, by excluding from the market the particular kind described.

“This consequence is too remote and too uncertain to warrant us in saying that the prohibition is an appropriate and plainly adapted means for carrying into execution the power of laying and collecting taxes.

“THERE IS, INDEED, NO REASON FOR SAYING THAT IT WAS REGARDED BY CONGRESS AS SUCH A MEANS, EXCEPT THAT IT IS FOUND IN AN ACT IMPOSING INTERNAL DUTIES. STANDING BY ITSELF, IT IS PLAINLY A REGULATION OF POLICE.

* * * * *

“As a police regulation, relating exclusively to the internal trade of the States, it can only have effect where the legislative authority of Congress excludes, territorially, all State legislation, as, for example, in the District of Colum-

bia. Within State limits, it can have no constitutional operation. This has been so frequently declared by this court, results so obviously from the terms of the Constitution, and has been so fully explained and supported on former occasions (License Cases, 5 How. 504; Passenger cases, 7 How. 283; License Tax cases, 5 Wall. 470, 72 U. S., XVIIIIM 500, and the cases there cited), that we think it unnecessary to enter again upon the discussion.”

In his brief counsel for defendant in error insists that because opium was once admitted under the tariff law, upon payment of duty, that therefore the statute involved here is a revenue statute.

This is an argument *reductio ab absurdum*. The fact that a measure was once a revenue measure, and that at one time opium was dutiable, would not signify that if Congress changed its legislative intent in respect to opium and desired to exclude it from entry into the United States, any new statute concerning opium would still remain a revenue measure. A revenue measure is a measure for the purpose of producing duty and revenue. An act of Congress excluding an article from this country is clearly not a revenue measure, but a measure passed under the commerce power of Congress to protect this country from the dangers of allowing such an article within the country.

Not only does counsel for defendant in error claim that the customs clause, and not the commerce clause, in the Constitution governs, but he further contends that this section should be sustained as an exercise by Congress of the power given in the Con-

stitution to make all laws necessary and proper to carry into execution the enumerated powers of Congress, amongst which is the power to raise revenue. This argument falls of its own weight if the opium statute involved is not a revenue measure.

Again, to quote from the brief of counsel for the defendant in error:

“Is Congress only allowed to take out one bite of the cherry and leave the remainder?”

To that, I would reply: “Yes, if the remainder is forbidden fruit.” The mere fact that Congress has the right to take one bite is no reason for arguing that Congress may take a dozen more. Congress can only bite, to speak figuratively, as far as the Constitution allows it to bite, and where the Constitution erects a prohibition, Congress stops.

Congress to follow out this metaphor may perhaps eat a dozen pears but it may only take one bit out of a cherry.

Defendant in error further argues that a person receiving goods bought from the army, if he received them off the Presidio Reservation and within the territory of any State, would not be subject to arrest if our theory were correct. This is absolutely fallacious, as the power to punish for receiving goods bought from army stores is under an entirely and totally distinct power of Congress. In fact the arguments of counsel for defendant in error shows that he fails to grasp the fundamental characteristic of our constitutional government, to-wit: the fact that the Federal government is constituted of

delegated powers and that when the Federal government acts through its legislative body, it must find authority in one of its delegated powers, and is circumscribed in the exercise of any of its delegated power by the interpretation which the Supreme Court of the United States has given to that delegated power. Thus, since in this case Congress has acted under a delegated power, to-wit: the commerce clause of the constitution, all its action under the commerce clause is of necessity dependent upon the interpretation given the commerce clause by the Supreme Court. This most fundamental fact, counsel for defendant in error has totally failed to grasp.

The only other point raised by counsel for defendant in error is that the case of *United States vs. Keller*, 53 L. Ed. 737, is not in point. Before discussing this point, it is to be emphasized that we rest upon no one single case. Our argument rests upon fundamental principles of American Constitutional law, and our purpose in quoting this case or in quoting any of the cases in our brief has not been to ask the Court, upon mere precedents, to decide this question; but we have quoted these cases to show the principles of constitutional law applicable to this case. However, as pointed out on the oral argument, the only distinction possible between these two cases, the Keller case and the case at bar, is the fact that in the case at bar the Act compels the defendant to know of the unlawful importation, whereas, in the Keller case,

there is no such provision, but possession alone is made *prima facie* evidence of guilt. However, both cases are analogous in this respect, and this is the fundamental respect—IN NEITHER CASE DID THE STATUTE REQUIRE ANY CONNECTION OR RELATIONSHIP WITH THE UNLAWFUL IMPORTATION.

Knowledge alone is insufficient to create Federal jurisdiction under the particular facts here involved.

It is also pointed out that after the decision in the Keller case, Congress amended the section and inserted in two places in the section hereinbefore held unconstitutional, the words: "In pursuance of such illegal importation." The amended section has never come before the Supreme Court for adjudication. But we are not even here concerned with whether or not the insertion of the words: "In pursuance of such illegal importation" is enough to avoid the pitfall of unconstitutionality. In the case at bar, there are no words identical or in anywise equivalent in their legal significance to these words: "In pursuance of such illegal importation." By no stretch of the imagination can we read into the section of the Act those words, and by no construction can the words "knowing the same to have been unlawfully imported" be held to be the legal equivalent of "in pursuance of such illegal importation."

This question was incidentally touched upon in the case of *United States vs. Krsteff*, 185 Fed. 203, where the Court, in commenting upon the power of Congress to punish persons dealing with alien women

for immoral purposes, after importation, used the following significant language:

“It is clear Congress has no such power unless by apt words in the statute **THOSE DEALINGS SHALL RELATE AND HAVE CONNECTION WITH SOME MATTER OF IMPORTATION WHICH IS MADE UNLAWFUL BY CONGRESS, AND THE MATTER OF UNLAWFUL IMPORTATION SHALL BE KNOWN TO THE PARTY SOUGHT TO BE CHARGED.**”

Thus not only is knowledge required by this decision but connection or relation with the unlawful importation as well.

Counsel for defendant in error endeavors to nullify the effect of the cases quoted as to the interpretation of the commerce power of Congress by the mere statement that these cases solely apply to interstate and not foreign commerce. In answer to this I would state that the section of the opium statute herein involved applies not only to foreign commerce but to interstate commerce as well, and further that the logic and reasoning of the Supreme Court in these interstate commerce decisions applies with equal force and with equal reason to an interpretation of the foreign commerce clause in the constitution. If we admit the reasoning of counsel for defendant in error there is never a termination of foreign commerce, and an article once in foreign commerce is always in foreign commerce.

In closing it may be emphasized as being of peculiar significance that Justice Harlan in the “Lottery Tickets” cases in his decision limits his decision to

the *interstate traffic* in lottery tickets solely. Why, we ask, these limitations? Why did Justice Harlan not say that the power of the Federal Government in view of the fact that lottery tickets are contraband extends unlimitedly anywhere in the United States?

Respectfully submitted,

P. S. EHRLICH.

No. 2444

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT, DISTRICT
OF CALIFORNIA

MAX STEINFELDT,

Plaintiff in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Petition for Rehearing

P. S. EHRLICH,

Attorney for Plaintiff in Error.

Filed this.....day of February, A. D., 1915

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

THE TEN BOSCH COMPANY, SAN FRANCISCO

FEB 26 1915

F. D. Monckton,
Clerk.

IN THE
United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT, DISTRICT OF CALIFORNIA

MAX STEINFELDT,

Plaintiff in Error,

vs.

THE UNITED STATES OF
AMERICA,

Defendant in Error.

No. 2444

PETITION FOR A REHEARING.

Counsel for petitioner respectfully petitions this Court that a rehearing in the above-entitled cause be granted, because of the deep and far-reaching consequences of this decision on the development of constitutional law. The Court, by its decision, grants to the Federal Government unlimited power within the confines and domain of any particular State, and it seems to entirely disregard the fundamental distinction pointed out by Justice Harlan in the Lottery Cases, *Champion v. Ames*, wherein the Court held that the power of Congress extended only so far as in-

terstate commerce in contraband articles, and did not extend to intrastate commerce in contraband articles.

If the Court should deny this petition of plaintiff-in-error for a rehearing, it is asked that the Court grant a thirty-day stay of execution for the purpose of allowing time to prepare a petition for writ of certiorari to the Supreme Court of the United States, or direct appeal, and, that pending the determination of such petition, or direct appeal, that plaintiff-in-error be admitted to bail.

Respectfully submitted,

PHILIP S. EHRLICH.

No. 2445

United States
Circuit Court of Appeals
For the Ninth Circuit.

NORTH ALASKA SALMON COMPANY, a Corporation,

Appellant,

vs.

PEDER LARSEN,

Appellee.

Apostles.

Upon Appeal from the United States District Court
for the Northern District of California,
First Division.

Filed

JUL 11 1911

F. D. [illegible]

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No. 2445

United States

Circuit Court of Appeals

For the Ninth Circuit.

NORTH ALASKA SALMON COMPANY, a Corporation,

Appellant,

vs.

PEDER LARSEN,

Appellee.

Apostles.

Upon Appeal from the United States District Court
for the Northern District of California,
First Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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UNITED STATES OF AMERICA.

District Court of the United States, Northern District of California.

CLERK'S OFFICE.

No. 15,354.

PEDER LARSEN,

Libelant,

vs.

NORTH ALASKA SALMON CO. (a Corporation),
Libelee.

Praeceptum for Apostles on Appeal.

To the Clerk of Said Court:

Sir: Libelee herein having appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree of this Court entered herein, you are hereby requested to prepare and certify the Apostles on Appeal, to be filed in said Appellate Court on or before the 20th day of June, 1914, said Apostles on Appeal to be prepared in accordance with Rule 4 of the "Rules in Admiralty" of said Appellate Court, and to include in their proper order the following papers and documents, to wit:

1. All the matters prescribed and mentioned in Admiralty Rule No. 4, Sec. 1 of said Appellate Court.
[1*]

2. The Pleadings.

3. All the testimony adduced at the hearing before said District Court, including deposition on file and exhibit.

*Page-number appearing at foot of page of original certified Record.

4. Opinion of the District Court.
5. Final Decree.
6. Notice of Appeal and Bond on Appeal.
7. Assignment of Errors.

Dated May 21, 1914.

D. FREIDENRICH,
Attorney for Libelee.

[Endorsed]: Filed May 22, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [2]

*In the District Court of the United States, for the
Northern District of California, First Division.*

No. 15,354.

PEDER LARSEN,

Libelant,

vs.

NORTH ALASKA SALMON COMPANY, a Cor-
poration,

Libelee.

Statement of Clerk—District Court.

PARTIES.

LIBELANT: Peder Larsen.

RESPONDENT: North Alaska Salmon Company,
a corporation. [3]

PROCTORS

for

LIBELANT: F. R. Wall, Esquire, San Francisco,
California.

RESPONDENT: D. Freidenrich, Esquire, San
Francisco, California.

PROCEEDINGS.

1912.

December 21. Filed verified Libel for Damages for breach of Contract of Good Treatment. Issued Citation for the appearance of Respondent, etc., and which said Citation was afterwards, on the 26th day of December, 1912, returned and filed with Return of the United States Marshal endorsed thereon as follows:

“I have served this writ personally by copy on North Alaska Salmon Co. (a corporation), by handing to, and leaving with R. E. Cotter, Secretary of North Alaska Salmon Company (a corporation), a copy thereof, personally at the City and County of San Francisco, in said District this 23d day of December, A. D. 1912.

C. T. ELLIOTT,

U. S. Marshal.

By M. J. Fitzgerald,

Office Deputy Marshal.” [4]

1913.

January 7. Filed Answer of Respondent.
May 28. Filed Deposition of Sigurd Andersen taken before Francis Krull, United States Commissioner.

1914.

March 12. The above-entitled case this day came on for trial in the District

Court of the United States, for the Northern District of California, before the Honorable M. T. Dooling, Judge, and after hearing, etc., the case was argued and submitted.

- | | | |
|-------|-----|---|
| April | 30. | Filed Opinion in Favor of Libelant. |
| May | 2. | Filed Final Decree. |
| May | 12. | Filed Notice of Appeal. |
| May | 19. | Filed Bond on Appeal and Superse- deas in the aggregate sum of \$1,250.00, with Fidelity and De- posit Company of Maryland as Surety. |
| May | 20. | Filed one volume of testimony taken in open court. |
| May | 22. | Filed Assignment of Errors. [5] |

*In the United States District Court, in and for the
Northern District of California, First Division.*

IN ADMIRALTY—No. —.

Libel for Damages for Breach of Contract of Good
Treatment, \$1,200.00.

PEDER LARSEN,

Libelant,

vs.

NORTH ALASKA SALMON COMPANY, a Cor-
poration,

Libelee.

Libel.

To the Honorable United States District Court, in
and for the Northern District of California:

The Libel of Peder Larsen, late a seaman on board of that certain ship or vessel known as and called the "Olympic," against the North Alaska Salmon Company, a corporation, owner of said vessel, in a cause of libel for breach of contract of good treatment, civil and maritime, alleges and articulately propounds as follows:

1. That as this libelant is informed and believes and therefore alleges the truth to be:

At all of the times hereinafter mentioned the libelee herein, North Alaska Salmon Company was, ever since has been, and still is, a corporation organized and existing under and by virtue of the laws of the State of California, with its principal place of business at San Francisco in said State; that at all of said times said libelee was, ever since has been, [6] and still is, the owner of that certain ship or vessel known as and called the "Olympic"; that at all of said times said libelee was the owner of and operated a salmon cannery at Locanock, in the District of Alaska.

2. That on or about the 17th day of April, 1912, at San Francisco, California, this libelant, shipped as a seaman on board of said "Olympic" for a voyage from said San Francisco to said libelee's salmon cannery at Locanock, Alaska, and return to said San Francisco, after the end in Alaska of the salmon fishing season of 1912; that on or about said 17th day of April, 1912, said libelant and said libelee entered

into articles of agreement by the terms of which said libelant agreed to serve said libelee in Alaskan waters during said salmon season of 1912, and that during the time said libelant should remain in the employ of said libelee during said season that said libelant was to work and labor for said libelee in the capacity of seaman, fisherman, beachman, and trapman, and also to work on boats, lighters and steamers at and about libelee's said cannery during said salmon fishing season; that by the terms of said articles of agreement, it was further agreed that said libelant should, while serving said libelee under said articles of agreement, receive medical and surgical attendance and medical and surgical necessities free of charge.

3. That on or about the 12th day of July, 1912, libelant's left leg was badly injured at the knee, without fault on libelant's part, so that libelant became sick, lame, sore and unfitted to work; that at the time said libelant was injured as aforesaid he was in the service of said libelee [7] under the aforesaid articles of agreement, and was at work for said libelee under said articles of agreement on board of a lighter belonging to said libelee, said lighter then being afloat in the waters of Brown's River, alongside of the fish dock of said libelee at said Locanock.

4. That after said libelant was injured as aforesaid, said libelee failed and neglected to furnish said libelant with proper medical and surgical care and attention, and compelled said libelant, after he was injured as aforesaid, to work on board of said "Olympic"; that said libelant did not and could not receive proper medical and surgical care and atten-

tion at said Locanock and that said libelee could and should have sent said libelant to Naknek or to Koggiung or to Dutch Harbor, at either of which places, as libelant is informed and believes, and therefore alleges the truth to be, libelant could have received proper medical and surgical care and attention; that on or about the 24th day of August, 1912, while libelant was sick, lame and sore as aforesaid, and growing worse, libelant requested libelee's superintendent at said Locanock to send libelant to said Naknek or to said Koggiung for treatment, but that said superintendent failed and neglected to send said libelant to either of said places; that on or about October 11, 1912, said vessel "Olympic" returned to said San Francisco, with this libelant serving on board of her under the aforesaid shipment, and said libelant was, on the 14th day of October, discharged from said vessel and from the services of said libelee; that at the time said libelant was discharged from said vessel as aforesaid, [8] said libelant was still sick, lame and sore, because of said injuries received as aforesaid, and said libelant was, at the time of said discharge, still in need of medical and surgical care and attention because of said injuries, and said libelant has, since said discharge, been compelled to incur and has incurred indebtedness in the sum of \$125.00, for medical and surgical care and attention, and will have to incur further expenses for said care and attention because of said injuries, in not less than the sum of \$15.00; that said libelant has been unable to do any work since said 14th day of October, and will not, as libelant is informed and believes, be able to do any work of any kind for a further period of two

months, and that it will be a further period of six months or a year before libelant will recover his full earning capacity.

5. That by reason of the premises libelant has been damaged in the sum of \$1,200.00, which sum he asks this Court to award to him.

6. That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, libelant prays that a monition, according to the practices of this Court, may issue against the said libelee, citing it to appear and answer on oath the matters aforesaid; and that this Honorable Court would be pleased to decree the payment of said \$1,200.00, to said libelant, with interest and costs, and that he may have such other and further relief in the premises as in law and justice he may be entitled to receive.

F. R. WALL,

Proctor for Libelant. [9]

State of California,

City and County of San Francisco,—ss.

Peder Larsen, being first sworn, deposes and says: That he is the person named as libelant in the above and foregoing libel; that he has read said libel and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on his information or belief, and as to such matters that he believes it to be true.

PEDER LARSEN.

Subscribed and sworn to before me this 20th day of December, 1912.

[Seal]

W. A. BRACE,
Notary Public, in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Dec. 21, 1912. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [10]

*In the United States District Court, in and for the
Northern District of California, First Division.*

IN ADMIRALTY.

PEDER LARSEN,

Libelant,

vs.

NORTH ALASKA SALMON COMPANY, a Cor-
poration,

Libelee.

Answer of Libelee to Libel.

Now comes Libelee, North Alaska Salmon Company, a corporation, and for answer to the libel on file herein, admits, denies and avers as follows:

Admits that on or about the 17th day of April, 1912, libelant and libelee entered into articles of agreement by the terms of which libelant agreed to serve libelee in Alaskan waters during the salmon season of 1912, and that during the time libelant should remain in the employ of libelee, during said season, that libelant was to work and labor for libelee in the capacity of seaman, fisherman, beachman and trapman, and also to work on boats, lighters and

steamers at and about libelee's cannery at Locanock, Alaska.

Denies that libelant shipped on board the ship "Olympic" for a voyage from San Francisco to libelee's cannery at Locanock, Alaska, in the capacity of a seaman or in any [11] capacity other than as specified in the articles of agreement entered into between libelant and libelee on or about April 17th, 1912.

Libelee denies that by the terms of the articles of agreement, entered into between libelant and libelee on or about the 17th day of April, 1912, or by the terms of any articles of agreement between libelant and libelee, it was agreed that libelant should, while serving libelee under said articles of agreement, or under any articles of agreement whatsoever, receive free of charge, or otherwise, or at all, medical and surgical attendance or medical or surgical attendance and medical and surgical necessities or medical or surgical necessities.

Denies, on its information or belief, that on or about the 12th day of July, 1912, or at any other time, libelant's left leg was injured or badly injured at the knee; denies that such injuries, if any, were without fault on his part; denies on information and belief, that libelant became sick, lame, sore, or unfitted to work; denies on its information and belief that libelant was injured while at work for libelee on board of the lighter belonging to the libelee alongside of the fish dock of libelee at Locanock.

Denies that libelee failed or neglected to furnish libelant with proper medical and surgical care and attention or with proper medical or surgical care or

attention. Denies that libelee compelled libelant after he was injured to work on board of the "Olympic." Denies that libelant did not or could not receive proper medical and surgical care and attention or proper medical or surgical care or attention at Locanock. Denies that libelee should have sent libelee to Naknek or to [12] Koggiung, or to Dutch Harbor. Denies that libelant could have received better medical or surgical care or attention at either of said places. Denies that on or about the 24th day of August, 1912, or at any other time, libelant requested libelee's superintendent at Locanock to send libelant to Naknek or to Koggiung for treatment. Denies upon its information and belief that libelant was at or about said time, sick, lame or sore, or was growing worse.

Denies that libelant performed any service on board the "Olympic" upon her return to San Francisco.

Denies that on or about October 14th, 1912, when libelant was discharged from the service of libelee, he was sick, lame or sore because of injuries received by him while in the service of libelee.

Denies upon its information and belief that libelant has since said discharge been compelled to incur or has incurred indebtedness in the sum of \$125.00, or any other sum, for medical or surgical care or attention, or will have to incur further expenses for such care or attention because of said or any injuries in not less than the sum of \$15.00, or any other sum.

Denies upon its information and belief that libelant has been unable to do any work since the 14th day of October, 1912, or will not be able to do any work

for the further period of two months or any other time, and denies upon its information and belief, that it will be a further period, of six months, or a year, or any other time, before libelant will recover his full earning capacity. Denies that by reason of the premises libelant has been damaged in the sum of twelve hundred dollars [13] (\$1200.00), or in any other sum.

Denies upon its information and belief that the cause of action set up in the libel is within the admiralty, or maritime jurisdiction of the United States or of this Honorable Court.

WHEREFORE, libelee prays to be hence dismissed with its costs.

D. FREIDENRICH,
Attorney for Libelee. [14]

State of California,
City and County of San Francisco,—ss.

R. E. Cotter, being first duly sworn, deposes and says: That he is the Secretary of the corporation, libelee, herein; that he has read the foregoing answer to said libel and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on his information and belief, and as to those matters he believes it to be true.

R. E. COTTER.

Subscribed and sworn to before me this 6th day of January, 1913.

[Seal] JAMES MASON,
Notary Public in and for the City and County of San Francisco, State of California.

Service of within Answer acknowledged this 6th day of January, 1913.

F. R. WALL,
Proctor for Libelant.

[Endorsed]: Filed Jan. 7, 1913. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [15]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Thursday, the 12th day of March, in the year of our Lord, one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

No. 15,354.

PERDER LARSEN,

vs.

NORTHER ALASKA SALMON CO.

Minutes of the Trial, etc.

This cause this day came on for hearing, F. R. Wall, Esqr., appearing for libelant, and D. Freidenrich, Esqr., appearing for respondent. Mr. Wall stated the case and introduced in evidence the deposition of Sigurd Anderson, taken before a U. S. Commissioner, and called Layton Robinson, Claude C. Long, Peter Larsen, August Kohler, who were each duly sworn and examined on behalf of libelant, and rested. Mr. Freidenrich called Max Luttich, Alexander Young, C. P. Hale, Thomas H. Evans, who were each duly sworn and examined on behalf of re-

spondent, and rested.

Mr. Wall recalled Perder Larsen, who was further examined in rebuttal.

The cause was then argued by respective counsel, and by the Court ordered that the cause be, and the same is hereby submitted to the Court for decision.
[16]

*In the District Court of the United States, in and
for the Northern District of California, First
Division.*

Before Hon. M. T. DOOLING, Judge.

No. 15,354.

PEDER LARSEN,

Libelant,

vs.

NORTH ALASKA SALMON CO.

Libelee.

Testimony Taken in Open Court.

TUESDAY, MARCH 17, 1914.

APPEARANCES:

For the Libelant: F. R. WALL, Esq.,

For the Libelee: D. FREIDENRICH, Esq.

[Statement of Proctor for Libelant.]

Mr. WALL.—If your Honor please, this is a libel *in personam* for damages for breach of contract of good treatment of a seaman. The libel alleges the fact that the North Alaska Salmon Co., the libelee, was at the time, and ever since has been, a California corporation, and was the owner of the “Olympic,”

and [17] at all of the times in the libel mentioned was the owner of and operated a salmon cannery at Locanock, in the District of Alaska; that on the 17th day of April, 1912, at San Francisco, the libelant shipped as a seaman on board of the "Olympic" for a voyage from San Francisco to the libelee's salmon cannery at Locanock and return to San Francisco at the end of the season 1912, and entered into an agreement to serve the libelee, and that during that time the libelant should remain in the employ of the libelee, the libelant was to do certain work for the libelee during the fishing season and further, it was agreed that the libelant should, while serving said libelee, receive medical and surgical attendance and medical and surgical necessities free of charge; that about the 12th of July, 1912, libelant's left leg was badly injured at the knee, without his fault, so that he became unfitted for work; that at the time he was injured he was working for libelee on board of a lighter, the lighter then being afloat in the water of Brown's River, alongside of the fish dock of said libelee at said Locanock. That after said libelant was injured as aforesaid, said libelee failed and neglected to furnish said libelant with proper medical and surgical care and attention, and compelled said libelant, after he was injured as aforesaid, to work on board of said "Olympic," and that libelant could not and did not receive proper medical care; that he could have been sent to Naknek or to Koggiung, or to Dutch Harbor, at either of which places, as libelant is informed and believes and therefore alleges the truth to be, libelant could have received proper medical and surgical care and attention. That on

or about the 24th day of August, 1912, while libelant was sick, lame and sore as aforesaid, [18] and growing worse, libelant requested libelee's superintendent at said Locanock to send libelant to said Naknek or to said Koggiung for treatment, but that said superintendent failed and neglected to send said libelant to said places. That on or about October 11, 1912, the "Olympic" returned to San Francisco with this libelant serving on board under the aforesaid shipment, and libelant was on the 14th day of October discharged from the vessel and from the services of the libelee. That at the time he was discharged as aforesaid, he was still sick, lame and sore, and was at the time of his discharge still in need of medical care and attention because of these injuries, and he has since his discharge been compelled to incur and has incurred indebtedness in the sum of \$125 for medical care and attention, and will have to incur further expenses for said care and attention because of said injuries in not less than the sum of \$15. That said libelant has been unable to do any work since the 14th day of October, and will not, as libelant is informed and believes, be able to do any work of any kind for a further period of two months, and that it will be a further period of six months or a year before libelant will recover his full earning capacity. And that by reason of the premises he has been damaged in the sum of \$1,200.

The answer admits the corporate capacity of the libelee, and that it was the owner of the "Olympic," and that it operated the cannery at Locanock; that libelant entered into the terms of employment whereby he was to work and labor for libelee in the capacity

of seaman, fisherman, beachman and trapman, and also to work on boats, lighters and steamers at and about libelee's cannery at Locanock, Alaska.

As to the remainder of the answer, it is a specific denial of [19] the allegations of the libel.

I offer in evidence, on behalf of libelant, the deposition of Sigurd Anderson, taken in these proceedings.

I will call the Deputy Shipping Commissioner as the first witness. [20].

[Testimony of Layton Robinson, for Libelant.]

LAYTON ROBINSON, called for the libelant, sworn.

Mr. WALL.—Q. What is your official occupation?

A. Deputy United States Shipping Commissioner.

Q. Have you with you the shipping articles of the barkentine "Olympic" for the season of 1912?

A. Yes, sir.

Q. Where did you get those?

A. The United States Shipping Commissioner's Office.

Q. These are the articles, are they?

A. Yes, sir; the ship's articles.

Q. The ship's articles of the barkentine "Olympic"? A. The bark "Olympic."

Q. Made at what time?

A. The 13th day of April, these were opened; the crew signed on the 15th, to start work on the 16th.

Q. 1912? A. 1912.

Mr. WALL.—We offer these in evidence as Libelant's Exhibit 1. That is all.

Mr. FREIDENRICH.—No questions.

[Testimony of Claude C. Long, for Libelant.]

CLAUDE C. LONG, called for the libelant, sworn.

Mr. WALL.—Q. Give your name, your age, and occupation.

A. Claude C. Long. I am a physician. Age, 32.

Q. How long have you been a physician?

A. About 21½ years.

Q. I will ask you if you know the libelant here, Larsen. A. I do, yes, sir. [21]

Q. Has he ever been under your care and treatment? A. He has, yes, sir.

Q. What time did he come under your care and treatment?

A. It was about the middle of October, 1912.

Q. What did you find to be his condition at the time he came under your treatment?

A. He had a chronic injury, a chronic inflammation of the knee-joint.

Q. Which knee, do you remember?

A. I think it was the right knee, if I am not mistaken.

Q. No, it was the left. A. The left.

Q. What was the nature of that injury, Doctor?

A. Well, it had evidently been due to some traumatism or bruise to the knee-joint.

Q. What was the condition of the sac under the knee-cap—the synovial sac, I think it is called?

A. It is badly distended with fluid.

Q. What is the normal condition of that sac?

A. Well, it should not be palpable at all.

Q. What would be the effect of an injury of that

(Testimony of Claude C. Long.)

character, as to producing pain, or not—that condition of the leg as to producing pain or not?

A. Well, it would naturally be very painful; any old chronic inflamed joint is always painful when used.

Q. What did you do with that when he came under your treatment? A. I put him in bed.

Q. What else did you do?

A. I applied hot compresses for about a month or six weeks, I think, or something like that, [22] and absolute rest in bed, and massage of the knee-joint.

Q. State whether or not you gave him any electrical treatment.

A. Not at that time; I did afterwards.

Q. I want the whole of the treatment he received during the time he was under your care.

A. Well, he was in bed for, I guess, a month or six weeks with hot compresses continuously applied to his knee. Then I would massage his knee and apply the belladonna and stronium ointment. After the inflammation and swelling had gone down, I advised gentle exercise around the house with cold and hot douches, alternating with cold and hot water two or three times a day, with gentle movement of the joint, getting up a gradual bending of the joint, so he could get increased flexion. He received several electrical treatments at my office.

Q. Do you recall the last time you treated him?

A. I don't recall just the date. I left my office hurriedly this morning, but, approximately, I think it was the latter part of January, or the first of Feb-

(Testimony of Claude C. Long.)

ruary, or around there some place.

Q. Of 1913? A. 1913.

Q. From your experience as a medical man, and your treatment of this case, state what, in your opinion, would be the length of time required for the leg to have got into good condition, as far as a cure was possible, if the man had received proper medical care and attention from the first.

A. Well, any injury of the knee-joint is a complicated proposition to handle, but I should think that the minimum time would have been six weeks or two months. It is a safer proposition to say from two to three months.

Q. It would be a safe proposition to say three months, would it? A. It would, yes, sir. [23]

Q. Doctor, have you been paid for your services in attending the libelant? A. No, sir.

Q. What is the amount of your bill?

A. I think it is somewheres about \$86.

Q. Is there anything, aside from that, for medicines, or anything of that kind?

A. No, he furnished his own medicine.

Q. Is that charge a usual and reasonable charge?

A. Very reasonable for a case of that kind.

Cross-examination.

Mr. FREIDENRICH.—Q. When did you first see the libelant, Larsen?

A. It was about the middle of October, I think; about the 15th or 16th of October, 1912.

Q. Where did you see him?

A. He came to my office the first time.

Q. Where was your office located?

(Testimony of Claude C. Long.)

A. 3272 Mission Street, 29th and Mission.

Q. Did you make an examination of his knee at that time? A. I did, yes, sir.

Q. And you found it inflamed? A. Yes, sir.

Q. How long after that did you treat him?

A. Well, I sent him home. I put him to bed. I saw him the next day.

Q. You took him to your home?

A. I sent him to his home.

Q. And you kept him in bed? A. Yes, sir.

Q. How long did you treat him?

A. I treated him until about the latter part of January, or the first of February, 1913.

Q. And you have not treated him since?

A. No, sir.

Q. Have you examined his knee since that time?

A. Not since February, 1913. [24]

Q. How was his knee at that time?

A. It was in very good shape, considering the condition it was in when I first saw it.

The COURT.—Q. That is only relative, Doctor; how was it?

A. You mean as to his having any further trouble with it?

Q. Yes.

A. Well, as I said, he was able to get around on it, and able to walk and follow any ordinary occupation, but these joints frequently cause trouble when they have over-exertion or straining; as to his having any further trouble, I could not say. If he exerted it too much, or strained it, it probably would be painful again.

(Testimony of Claude C. Long.)

Mr. FREIDENRICH.—Q. At the time that you first examined the knee, was there any scar upon the knee?

A. There was no scar, no, that I remember.

Q. Nothing about the knee or the leg to indicate any injury, was there? A. Yes, sir.

Q. What was it?

A. Well, he had a very little movement—motion, the motion was limited to about 50 per cent, and his knee was swollen very much, and there was water in the membranes, in the sacs about the knee, indicating an old, chronic inflammation.

Q. A chronic inflammation?

A. Well, what I mean by “chronic” is an inflammation that had been running there several months.
[25]

[Testimony of Peter Larsen, in His Own Behalf.]

PETER LARSEN, the libelant, sworn.

Mr. WALL.—Q. Give your name, age and occupation.

A. My name is Pete Larsen; age, 44; seaman and fisherman.

Q. You are the libelant in this case, the person who is bringing this suit, are you not?

A. Yes, sir.

Q. Did you ship on the “Olympic” in April, 1912?

A. Yes, sir.

Q. I will show you the shipping articles of that vessel, opposite No. 135, and ask you if that is your signature. A. Yes, sir.

Q. You signed these shipping articles and agreement, did you? A. Yes, sir.

(Testimony of Peter Larsen.)

Q. From the time you signed the articles, did you go up to Alaska that season to work for the North Alaska Packing Company? A. Yes, sir.

Q. What did you do on the way up?

A. Worked on the ship.

Q. As what? A. As a seaman, steering.

Q. And after you got there what did you work at?

A. To start the ship; I was working on sails on board the ship.

Q. And then what?

A. When the ship was started, I worked on the boats until we commenced fishing.

Q. What time did you begin fishing?

A. In the latter part of June; I have forgotten the date we commenced fishing.

Q. How long did you fish?

A. I fished up to the tenth of July.

Q. Then what did you start doing?

A. I was called ashore to work ashore; we started in to discharge fish. There was so much fish brought in we had to call in some boats to help discharge the fish. [26]

Q. When you were discharging the fish, where would you be working? A. In a lighter.

Q. What sort of a vessel was that?

A. Just like a barge, but she had a railing around her, just like bulwarks around it, about five feet high.

Q. That barge, or lighter, what was it used for when you first began fishing?

A. She was used to haul fish up and down the river, to bring them to the fish wharf.

(Testimony of Peter Larsen.)

Q. Where would she go to get the fish?

A. In the beginning of the season, she went down below, away down toward Naknek, or they towed it up Brown's River to discharge at the fish wharf.

Q. And the boats would bring their fish to her and load them on board of her?

A. The boats discharged the fish on to this barge.

Q. And then she would be towed up to the cannery dock?

A. She would be towed up to the fish wharf, and we would discharge the fish there.

Q. State whether or not you were hurt at any time while you were up there.

A. I was hurt on the 12th of July.

Q. On the 12th of July? A. Yes, sir.

Q. Where were you at the time you were hurt?

A. I was in the lighter.

Q. Where was the lighter at that time?

A. She was lying alongside of the fish wharf.

Q. Was she afloat or not?

A. She was afloat, yes, sir.

Q. What were you doing on board of her?

A. I was throwing fish into a bucket, a fish bucket, into a tub that they hoist the [27] fish up in and dump it on the wharf.

Q. Where were you standing at the time?

A. I was standing on the lighter, toward the in-shore side of the lighter.

Q. What were you standing on? A. The fish.

Q. Go ahead and tell the Court just how you got hurt.

A. I was standing on the lighter and throwing fish

(Testimony of Peter Larsen.)

into this bucket, and when the bucket was full, they started to hoist it up, and I was standing on the in-shore side, and I had to make a quick move to get out of the way, because the bucket swung toward me, and I slipped and I sprained my knee.

Q. Which knee? A. The left.

Q. What was the condition of the knee before you sprained it at that time?

A. It was in good condition; there was nothing the matter with it before; if there had been anything the matter with it before, I would not have been working where I was.

Q. State whether or not you had any injury to this knee after this time, and until you brought this suit. A. No, sir.

Q. Can you tell the Court just how you sprained your knee?

A. Yes, sir. I was standing there throwing fish into the bucket and I had my back turned toward it, like, and was sideways, and as soon as the fish tub was full, they started to hoist it kind of quick, and without any warning, and before I had a chance to get away off she swung over toward me; I might have got hurt very badly, because she might have got me up against the side of the lighter, and so I made a quick move, and I slipped on the fish and that is how it happened; I twisted my knee.

Q. As I understand you, the bucket did not hit you?

A. No, sir, did not hit me, but she would have hit me if I did [28] not make that move to get out of the way.

(Testimony of Peter Larsen.)

Q. After you were hurt, state what you did and what was done with you or for you.

A. I was brought up on the machine that they transfer the fish up to the wharf on, and I got to the bunk-house and they telephoned for a doctor and the doctor came down and he said he didn't think there was much the matter with me, and he painted it with a little iodine—

Q. (Intg.) Just state that over again.

A. When the doctor came down he examined my knee and he said, "I don't think there is much the matter with you; you will be all right in the morning," he painted it with iodine and gave me a bottle of ointment and some pills to take. He did not come down again until the 15th.

Q. You were taken to the bunk-house?

A. Yes, sir.

Q. How far was that from the fish dock?

A. I guess it must be half a mile or three-quarters of a mile; I could not judge it just exactly.

Q. And you say you did not see him again until the 15th? A. No.

Q. Did he come to see you at that time?

A. On the 15th he came down to see me again, and he said, "Nothing is the matter with your knee at all"; he said, "The only thing the matter with you is you better get out and go to work." He turned around to the boss, Max, and said "Max, turn him to—."

Mr. WALL.—(Intg.) I would like to have all the witnesses withdraw on both sides. Now, proceed with your answer.

(Testimony of Peter Larsen.)

A. (Contg.) Max didn't say nothing. Max was smiling, and nodded to me, just as to say he knew better, I was not able to turn to, and so he didn't turn me to.

Q. He didn't turn you to?

A. No, not then.

Q. Then what did you do?

A. I didn't do nothing from then [29] until the first of August.

Q. You stayed in the bunk-house, then, until the first of August? A. Yes, sir.

Q. Then what did you do?

A. I went aboard the ship; I don't know whether it was the first or second, but when he sent the crew on board again Max came to me and he says, "Larsen, you better go on board the ship and work on the ship, or mending sails, do what you can; you'll get the average of the rest of the fish that was caught from the time you were laid up." So he sent me aboard the ship, and I worked sails from the first to the 23d or 24th, when I came ashore.

Q. Of August?

A. Yes, sir, and I came ashore to see the doctor again, my knee commenced to get so bad then I could hardly walk on it; I had to get a stick.

Q. How did you get a stick?

A. One of the boys made a stick for me, and he made a crutch for me, too, one of the sailors, one of the fishermen; so I went ashore, and I asked the bookkeeper to telephone to the doctor; he telephoned to the doctor, but the doctor said to the bookkeeper to sent me up to the hospital, or for me to come up to

(Testimony of Peter Larsen.)

the hospital; well, I had all I could do to get from the wharf up to the bunk-house, without walking three miles up to the hospital, up to Holliwell. So he came down to see me, and he said, "Let me see that knee of yours." So he examined it, and he said, "There is nothing at all the matter with your knee; there is nothing the matter with it at all." I said, "I don't think you are a doctor at all, if you can't see that there is something the matter with this knee of mine; you can't be much of a doctor." "Well," he says, "I have been practicing 12 or 15 years, and I ought to know something [30] about it." He said, "All that's the matter with you is that you are lazy; all you want is lots of work; there is nothing the matter with your knee that I can see, but you might be able to find it out down below," or something like that, "you might be able to find out more about it down below." Of course, I went down and spoke to the superintendent, and asked him if he would send me either—

Q. (Intg.) Who was the superintendent?

A. Hale, Chris Hale. I asked him to send me either to Nushigak, Koggiung or Naknek, or over to Dutch Harbor, to see other doctors around there. I told him how this doctor treated me; they all knew, anyhow, the treatment I got.

Q. How far was Naknek from where you were?

A. About 30 miles.

Q. Was there a doctor and a hospital there?

A. Yes, sir.

Q. How far is Koggiung from where you were?

A. About five or six miles.

(Testimony of Peter Larsen.)

Q. Was there a doctor there?

A. Yes, sir, there is a Government doctor there, and also a Government doctor at Nushigak.

Q. How far is Dutch Harbor?

A. About 350 or 375 miles, or probably 400 miles. I think it ought to be about 400 miles, right across the Behring Sea.

Q. This cannery was right up at the head of Bristol Bay, was it not?

A. Right at the bay; about 60 miles from the entrance of the river.

Q. What did the superintendent say when you asked him about sending you over to those places?

A. He said he will see; he said, he will attend to it. He said he will attend to it, but I didn't hear nothing. He didn't attend to it, he didn't give me any treatment. [31]

Q. He didn't send you to either of those places?

A. No, sir. I stayed there three or four days and I talked to the bookkeeper, and I talked to Smith about it, but they didn't send me one place or the other, and I went aboard the ship and we started out for home.

Q. Did you do any work when you went aboard ship at that time?

A. I finished up the sails, the large sail I was working on, the topsail, but that is all I could do; I could absolutely hardly walk; I could not handle the sails, or do anything more after that; I did very little on the way home.

Q. What time did the "Olympic" leave up there for San Francisco?

(Testimony of Peter Larsen.)

A. She must have left somewhere around the first of September.

Q. What time did she arrive in San Francisco?

A. On the 14th of October; I don't know whether it was the first or the second of September she left up there.

Q. And after she arrived in San Francisco, where did you go?

A. I went to a doctor right away.

Q. Doctor Long?

A. No, I went to another doctor out in the Mission, first, and he advised me to go to the hospital. I went down to Haller's office; he took me down in an automobile to Haller's office, and I spoke to Haller.

Q. Who is Haller?

A. He is the manager of this fishing company.

Q. The manager of the cannery up there?

A. The manager of the Alaska Salmon Company.

Q. He is the manager for the North Alaska Salmon Company?

A. Yes, sir, and he said he wouldn't have nothing to do with me at all. I wanted to know if he would go good for the doctor's [32] bill, and settle with me a little reasonably, I wanted to see if he was going to do that; I didn't have much money, I was short of money, I was laid up, and a big family to support; and he said, "I would not have anything to do with it all," and this doctor wouldn't take it and wait for his money, so I had to go to Doctor Long. He took me in hand on the 16th and he treated me right up to February. I didn't get out to work

(Testimony of Peter Larsen.)

until the 28th of February, 1913.

Q. You were not able to work until the 28th of February, 1913? A. No, sir.

Q. What do you earn on an average during a year?

A. Well, I have not figured it out. When I am well, when I go to Alaska for five months—the year before I averaged \$550; and of course that season that I was up there I lost by not being able to work from the 12th; of course, I got the average, but that is not what I would have earned, if I had been able.

Q. What did you get for the average?

A. It didn't amount to much—I forget what it was; I can't think of that.

Q. About how much would it be?

A. \$50 or \$60, I guess, something like that. I forget how many thousand fish they did get. We get paid at the rate of so much a thousand. I think it amounted to about \$70.

Q. I mean for the season.

A. For the season I made \$530.

Q. That is, from April 17th, until October 14th, you got \$530? A. Yes, sir.

Q. Did that include your run money?

A. Yes, sir, that was everything.

Q. That was including everything?

A. Yes, sir.

Q. When you are down here, what business do you generally work at? A. Longshore. [33]

Q. When you work alongshore, how much do you get?

(Testimony of Peter Larsen.)

A. \$4.50 when I am working, and if I am bossing, I get 5.

Q. How much time do you work out of the month?

A. About 20 or 23 days a month.

Q. Between 20 and 23 days a month?

A. Yes, sir.

Q. State whether or not you paid out anything for medicines during the time you were sick.

A. I paid out \$15 for medicines and bandages.

Q. After you went to work, what was the condition of your leg then?

A. I could not work at the work I done before. I was not able to do trucking on the dock, or down below; I could not carry any heavy weight; and I cannot carry any heavy weight yet, because my leg doubled up on me.

Q. Otherwise, what is the condition of your leg—pretty good?

A. Pretty good, but it is stiff. If I stand and twist and turn sideways like, it always hurts me through the knee, under the knee-cap; and it often swells up if I work hard; it always swells up on me.

Q. During the time that you were laid up in San Francisco, and not working, what were your average expenses outside of the expenses of your medical care and attention and medicine?

A. Seventy-five dollars a month I had to use for my expenses, for eating and for fuel and for the children and myself and my wife; \$75 a month is the cheapest I could possibly get along on, and I had to get along on it, because I had no more to use.

Q. Besides the \$530 that you got for the fishing

(Testimony of Peter Larsen.)

season, you also got your board and lodging, did you not? A. Yes, sir.

Q. You get your board and lodging from the time you leave San Francisco until you get back to San Francisco? A. Yes, sir. [34]

Cross-examination.

Mr. FREIDENRICH.—Q. On the day that you were hurt, which you say was the 12th day of July, were you struck by the fish bucket? A. No, sir.

Q. How far away were you from the fish bucket at the time that you were hurt?

A. The fish bucket was only about three feet to the back of me.

Q. And you were not struck at all by the bucket?

A. No, sir.

Q. Well, how did you get hurt?

A. By making a quick move to turn around so that the bucket would not strike me when she swung toward the bulwark, because if I had not jumped so quick out of the way the bucket would have hit me.

Q. Did the bucket swing? A. Yes, sir.

Q. It swung towards you? A. Yes, sir.

Q. And to avoid being struck, you made a quick movement? A. Yes, sir.

Q. And that is what caused the injury?

A. Yes, sir.

Q. And you are quite sure that the bucket swung toward you?

A. Yes, sir, she is on a swinging gaff.

Q. Who was present at that time?

A. The boss was there; the man who was doing the hoisting; the man who was doing the donkey-driv-

(Testimony of Peter Larsen.)

ing. There was three or four men in the lighter doing the same work I would do.

Q. Was there a man named Luttick present?

A. I don't know; I don't remember the name. What is the first *time*?

Q. Max Luttick?

A. Max, yes, I know him; he is the boss, if I am not mistaken.

Q. Do you know a man named William J. Young?

A. Yes.

Q. Was he present at the time? [35]

Q. You say he was not?

A. I don't think so, unless he was on the wharf; if he was on the wharf I don't know, because I could not see anybody that was on the wharf.

Q. What was done after you were injured?

A. I was helped up to the bunk-house.

Q. Who helped you up?

A. The wenchman helped me up, and one of the fellows that works on the dock. He helped me up in a machine that they used to transfer the fish from the dock up to the cannery.

Q. About what time in the day was that?

A. Half-past four.

Q. How soon after that did the doctor come down?

A. About an hour or half an hour.

Q. About an hour?

A. Half an hour; he came down very quick.

Q. How far is Halliwell from Locanock?

A. Two or three miles, I guess; $2\frac{1}{2}$ miles or something like that; I could not say.

Q. And the doctor came down—

(Testimony of Peter Larsen.)

A. (Intg.) In about three-quarters of an hour, maybe.

Q. And you were lying in a bunk in the bunk-house, were you?

A. I was sitting on a bench alongside of my bunk.

Q. Did the doctor make an examination of your leg? A. Yes, he did.

Q. How long was he engaged in the examination?

A. Oh, he looked at it for a couple of minutes and painted it with iodine and gave me some liniment he had along.

Q. When did you next see the doctor?

A. On the 15th.

Q. That was four days afterwards?

A. Three days afterwards, the third day afterwards.

Q. And did he make an examination of your leg at that time? A. He did, yes, sir. [36]

Q. Did you have any difficulty with the doctor at that time?

A. Oh, no; we had a few words. He said, "Nothing is the matter with it," and he ordered me to work; he turned around to the boss and said, "There is nothing the matter with this man's leg, Max; turn him to."

Q. And all you had with him was a few words?

A. Oh, no; I struck him in the face on the 24th—on the 23d of the next month.

Q. On the 24th you did what?

A. On the 23d of August I struck him in the face.

Q. You slapped him in the face on the 23d?

A. Yes, sir.

(Testimony of Peter Larsen.)

Q. Did you have any difficulty with him up there in the month of July? A. No, sir.

Q. Did you have a fight with him up there?

A. No, sir, not in the month of July.

Q. Not in the month of July? A. No, sir.

Q. Did you have in the month of August?

A. On August 24th, yes; he didn't come to see me from the 15th of July to the 24th of August; he never came to me at all. I sent up for some medicine. Two men had sore fingers. He said, "I don't mind giving treatment to anybody who is sick, but with that man, nothing is the matter with him. I will mix him up something good this time," and he sent me down a bottle of liniment, or something that looked like it, and I was afraid to use it, but I rubbed it on the skin, but it was something like water. I know what he meant afterwards when he said something strong; I thought it was some soap and water.

Q. On the 24th you did have an altercation with him?

A. Yes, because he ordered me out and said nothing was the matter with my leg. I told him, as I will say right straight, "If my leg [37] was so good as you say it is, you would not have got out of the bunk-house in such a hurry. I will give you a good slap, and I will give it to you anyway," and I slapped him in the face, just where I stood.

Q. You slapped him in the face?

A. Yes, and he grabbed a shotgun and got alongside the door and he opened the door and got out and was going to shoot.

Q. During that period, between the 12th of July

(Testimony of Peter Larsen.)

and the 24th of August, did you have any talk with Mr. Hale, the superintendent?

A. I had a talk with him, yes, sir.

Q. Do you mean to say that you asked Mr. Hale to send you to Dutch Harbor to the hospital?

A. I didn't ask him to send me to Dutch Harbor. I asked him to send me anywhere to a doctor; I didn't mention any special place to Mr. Hale, no, sir.

Q. You didn't mention any particular place?

A. No, sir. I asked him to send me anywhere to a doctor to get medical treatment.

Q. Didn't Mr. Hale offer to send you to Dutch Harbor, where there is a hospital?

A. No, sir, he never offered that to me.

Q. He did not? A. No, sir.

Q. At no time? A. No, sir.

Q. And didn't you refuse to go? Didn't you say that you didn't want to go, or words to that effect?

A. No, sir, I would certainly have liked him to have sent me to any doctor; not so far as Dutch Harbor. If he sent me to Koggiung or to Naknek it would be all right, because I fished there and I knew there was a good doctor there.

Q. Do you know a place up there called Hagnak, or some such name as that? A. No, sir. [38]

Q. Koggiung?

A. Yes, I know that place; that was six miles below.

Q. And there is a hospital there, is there not?

A. Yes, I believe there is; there is a Government doctor there.

Q. Didn't Mr. Hale, the superintendent, offer to

(Testimony of Peter Larsen.)

send you to Koggiung? A. No, sir.

Q. And didn't you say you didn't want to go?

A. No, sir.

Q. Did you ever ask Mr. Hale to send you either to Dutch Harbor or to Koggiung?

A. No, sir; I didn't ask him to send me to any particular place at all. I asked him to send me anywhere, to a doctor, because there were doctors all around, yes, sir.

Q. Did you not, on or about the 24th of August, ask Mr. Hale, who was the superintendent, to send you to Locanock or to Naknek—to send you to Naknek or to Koggiung for treatment?

A. I asked him to see a doctor, either one place or the other. I didn't ask him to send me exactly to Koggiung, Naknek or Dutch Harbor, no, sir.

Q. Did you ask Mr. Hale to send you there?

A. Yes, sir, I asked him to be kind enough to send me to either one of those places to get treatment, but I didn't mention any special place; I said, "There is a Government doctor in Koggiung, and also one at Nushigak, and also a very good doctor at Naknek, where I fished the year before, and he is a very good doctor, and I know he treated several patients there, and there was no fault to find.

Q. Now, I will ask you if he did not offer to send you to either one of these places.

A. Mr. Hale said to me, "I will attend to it, Larsen, I will attend to it," but nothing ever came up. He said, "If I can't get any other steamers, as soon as any [39] other steamers are idle, I will see what I can do," but he never came to me or sent me

(Testimony of Peter Larsen.)

anywheres, no, sir. He promised, but he did not come up to his promise.

Q. During the time that you were on shore, and before the "Olympic" started for her return, you occupied a bunk in the bunk-house, did you not?

A. I occupied a bunk in the bunk-house from the 12th of July until the 1st of October, I guess—no, I mean August.

Q. And they furnished you with all the necessities which you required, did they not?

A. I had to limp out there and go to the cook-house for my meals. They helped me along. I was on a crutch and a stick during that time. I had to walk over there to get them myself. Sometimes, when it was bad weather, the boys brought it in to me.

Q. They paid you according to the wages agreed upon?

A. They paid me according to the average of the fish caught from the 12th of July until the time they called the boats in.

Q. And after you were hurt, on the 12th of July, you did no work at all, did you?

A. I didn't do anything from the 12th until the first of the next month, when I went aboard of the ship and I worked up until the 24th or the 23d of August. I went aboard on the 1st and mended sails. I was asked to go aboard, so as to get my average, and if I didn't go aboard I wouldn't get my average.

Q. Mr. Larsen, after you returned to San Francisco, have you been doing any work at all, did you do any work at all since you returned to San Fran-

(Testimony of Peter Larsen.)

cisco? A. Yes, sir, I have, a little.

Q. You are working yet?

A. Light work I can do, but it is very hard to get it; I get such a thing as driving a steam winch, [40] or anything like that, but that is very hard to get. Of course, I generally used to be working on the dock, or down in a ship's hold; I can't get light work; there is not so much of it. There is only one man required to tend hatch, while there are eight or ten doing the hard work.

Q. Have you had any trouble in San Francisco since that time? A. No, sir.

Q. You have not been in jail, have you?

Mr. WALL.—We object to that. We do not contend there has been any damage beyond the time he was able to go to work, so far as cure is possible.

A. I have not had any trouble with anybody since then.

Mr. FREIDENRICH.—Q. How many days have you worked since January, 1913?

A. I didn't do no work until the 28th of February, 1913.

Q. You didn't do anything up to that time?

A. No, sir.

Q. Since that time have you done any work?

A. Since that time I have been working, yes, a little.

Q. You have been working steady since that time?

A. No, sir, not steady, because I am not able to work steady, I can't do the work I used to do before, I can't work steady.

Q. Before you started on this trip, what was your

(Testimony of Peter Larsen.)

average weekly salary, or how much did you get weekly for your work?

A. Oh, it is very hard for me to state that, because we are not working by the week; we work only when we get a ship to discharge; sometimes we might have two ships a week, or sometimes we are working on one for more than a week.

Q. But you never had any steady occupation?

A. Oh, yes, I used to have a good steady occupation for Captain Woodside; I averaged four and a half, according to the union wages, on some ships [41] and \$5 on others; it all depends on where the ships come from and what ships they are.

Q. Were you compelled to do any work on the "Olympic" coming down? A. No, sir.

Q. You were not?

A. No, sir; I was not compelled to do any work coming down.

[Testimony of August Kohler, for Libelant.]

AUGUST KOHLER, called for the libelant, sworn.

Mr. WALL.—Q. You were a seaman and fisherman for the North Alaska Salmon Company during the season of 1912, were you not? A. Yes, sir.

Q. Were you in the bunk-house on the 12th of July, 1912, at the time that Larsen was brought in there? A. Yes, sir.

Q. Did you see the doctor come in to see him at that time? A. Yes, sir.

Q. Tell the Court fully just what happened, so far as you know yourself, what you saw, what you

(Testimony of August Kohler.)

heard, and what was done.

A. I was in the bunk-house and the doctor came in; Larsen had damaged his knee. He said, "Well, what's the matter with you?" Larsen said, "I hurt my knee"; he said, "The way the fellow was telephoning, I thought you broke your neck; the next time a thing like that happens, I won't come at all." So he examined his leg, and he said, "There seems not much the matter with your leg." I seen him rubbing some iodine on. He gave him a couple of pills. He said, [42] "You will be all right in the morning." Some days later, I saw him coming in again.

Q. About how long afterwards did you see him come in, about how many days later?

A. I didn't pay any attention to it; it might be three or four days.

Q. What time was it that he came in there?

A. You mean the doctor?

Q. Yes, what time of the day?

A. In the afternoon.

Q. Go ahead and tell what happened then.

A. He examined his leg again, and he said, "There is nothing the matter with your leg." He said to Max, the beach boss, "You better turn that man to." "You are nothing but lazy." Larsen said, "Well, you must know more about my leg than I do myself." And he said, "Oh, yes." He said, "I studied these cases for the last fourteen years. I will go off and see old man Hale and tell him to give him lots of work." And I seen him walk off in that direction.

Q. In the direction of Hale's place?

(Testimony of August Kohler.)

A. Yes, sir.

Q. Did you see the doctor in there after that?

A. Oh, yes, it was long after that.

Q. About how long after that did you see him there again, later, about how many days or weeks?

A. That might be three weeks later, or something like that, or four weeks later.

Q. At that time tell just exactly what happened, the third time.

A. Well, the third time when he came in, Larsen came from the ship, he was working on board the ship sewing sails; he sent up for the doctor and the doctor came down.

Q. Did you see Larsen come into the bunk-house?

A. Yes, sir.

Q. How was he walking?

A. He was walking on a cane or a crutch; I don't know exactly—I guess he had a cane. His leg was [43] then in the same shape *was* it was before; he showed us the leg. The doctor came in, and he had a shotgun with him; he put the shotgun in the corner, by the door, and he says, "Well, how about you?" Larsen told him, "It is worse than it was before, so far as I can see." He said, "I can't walk or do nothing." He said, "Walk across the room." Larsen limped across the room. And he said, "Put your pants down." And Larsen did, and stood up, and he wanted to break the knee through. He was laughing, and he said, "Well, I guess there is nothing the matter with you; you might find out more about it when you come down to San Francisco." Larsen said, "That's what I am going to do." He said, "I

(Testimony of August Kohler.)

thought you would change your mind by this time; the leg is worse than when it was first hurt. I don't think you are much of a doctor, at all."

Q. What did Larsen do then?

A. Well, Larsen told him, he says, "If I had my two legs, as you say I have, you would perhaps need a doctor yourself to take care of you; you would go out of here in a hurry." So at that time Larsen buttoned up his pants and he batted him one on the nose, and the doctor reached for his gun and went outside, and when he got outside he cocked the gun, but after while he walked away. That is all I know about it.

Mr. FREIDENRICH.—No cross-examination.

Mr. WALL.—That is the libelant's case on direct.
[44]

[Testimony of Max Luttich, for Respondent.]

MAX LUTTICH, called for the respondent, sworn.

Mr. FREIDENRICH.—Q. What is your occupation?

A. Mate on board the ship and beach boss at the cannery.

Q. Where were you in the month of July, 1912?

A. At Locanock cannery, as beach boss.

Q. In whose employ were you?

A. In the employ of the North Alaska Salmon Company.

Q. Do you know Peter Larsen, the libelant?

A. Yes, sir.

Q. Did you see him on the 12th of July, 1912?

(Testimony of Max Luttich.)

A. Yes, sir.

Q. Where were you at that time?

A. I was on the wharf superintending the work.

Q. Did you see him at the time that he claims his leg had been injured? A. Yes, sir.

Q. State just what occurred at that time.

A. I was at the wharf attending to taking the fish up, and as I blew the whistle, Peter Larsen turned himself and claimed his leg was twisted.

Q. Did you give the signal to the engineer?

A. Yes, I did.

Q. At that time you were standing where?

A. I was standing by the derrick, on the wharf, right above the place where he twisted his leg.

Q. Did the fish bucket swing at all?

A. No, sir, it could not swing.

Q. It could not swing? A. No, sir.

Q. Why not?

A. Because there is a guy on the gaff.

Q. Did you notice Peter Larsen just before he was hurt? A. Yes, sir.

Q. How far from the bucket was he?

A. About four feet.

Q. Did the bucket strike him at all?

A. No, sir.

Q. Do you know how he got hurt?

A. Yes, sir, I seen him standing [45] like this, he had his pew in his hand, and as I blew the whistle he turned himself, and then he hurt his knee.

Q. What was done after he complained that he had been hurt?

A. I got a couple of men to help him up the ladder

(Testimony of Max Luttich.)

to the wharf, and I put him on the car and sent him up to the bunk-house, and after I got through I went up to the bunk-house and asked him if he wanted to go to Halliwell, to the hospital, and he said no, he didn't think it was necessary.

Q. How far is that from your place?

A. Three miles.

Q. Is there a hospital over there?

A. We call it a hospital; there is generally some kind of a doctor there, and they have some rooms fixed up as a hospital.

Q. And you asked him if he wanted to go there?

A. Yes, sir.

Q. And he said he did not think it was necessary.

A. He said he didn't think it was necessary?

Q. What was done about telephoning for a doctor?

A. I telephoned up from the wharf to the superintendent of the cannery, and he telephoned to Mr. Hale, first, but Mr. Hale could not be got at the time. When I came up, myself, at six o'clock, I telephoned to Mr. Hale; it might have been six or half-past six.

Q. Mr. Hale is the superintendent of the cannery?

A. Yes, sir.

Q. Where did you telephone to?

A. To Halliwell.

Q. Three miles away? A. Yes, sir.

Q. Did the doctor come?

A. Yes, sir, the doctor came. He arrived there about a quarter to eight, or eight o'clock.

Q. What is the name of the doctor?

A. I don't know.

Q. You don't know his name? A. No.

(Testimony of Max Luttich.)

Q. Were you present when the doctor examined him? A. No, not then, not at that time. [46]

Q. Did you after that see the doctor?

A. I seen him there afterwards, yes, about two or three days after that.

Q. Was he attending to Larsen then?

A. He was attending to Larsen then.

Q. Did you observe him make an examination?

A. He bared his leg and looked at his knee; that is all he done to it in my presence.

Q. Did you see Larsen's leg at the time?

A. Yes, sir.

Q. Was there any scar on it?

A. Not that I recollect.

Q. That is all you know about the case?

A. That is all I know about it.

Cross-examination.

Mr. WALL.—Q. You say you asked him if he wanted to go to Halliwell? A. Yes, sir.

Q. How far is Halliwell from the bunk-house?

A. About three miles.

Q. The same doctor came down to the bunk-house from Halliwell? A. Yes, sir.

Q. You say there was a guy on the gaff—

Mr. FREIDENRICH.—(Intg.) One moment, Mr. Wall; there is one question I would like to ask.

Mr. WALL.—Very well.

Mr. FREIDENRICH.—Q. Did you have a talk with Larsen after that?

A. No, only when I came up to the bunk-house, after I telephoned to the doctor and asked him

(Testimony of Max Luttich.)

whether he wanted to go to Halliwell, that is the only talk I had with him.

Q. At the time he went aboard the ship, coming back, did you have a talk with him as to the condition of his leg?

A. Just before he went aboard the ship, I asked him if he wanted [47] to go aboard the ship or stay ashore, whether he was able to do any work, and he said he would be able to do some sail-making work, because he could sit down to that and would not have to move.

Q. Did you ask him about his leg at that time?

A. Yes, I asked him and he said it was getting better, but slow.

Mr. WALL.—Q. You say there was a guy on the gaff? A. Yes.

Q. What is that?

A. The guy is a rope to steady the gaff from swinging, just so that the tub cannot swing.

Q. That is, you were on the wharf, on the fish dock? A. Yes, sir.

Q. And there is an upright from the wharf that stands up like that? A. Yes, a derrick.

Q. And the gaff comes over from it?

A. No, the gaff leads out from the derrick.

Q. It leads out over the barge or lighter?

A. Yes, sir.

Q. The gaff does? A. Yes, sir.

Q. And you say there was a guy on that gaff?

A. Going down from the gaff to the lighter, with a man attending to it.

(Testimony of Max Luttich.)

Q. Well, you don't know whether that man slacked it or not, do you? A. I know he did not slack it.

Q. Hanging from the gaff, is the tackle that the bucket is hooked on?

A. It is a worm piece of wire that is lifted by steam.

Q. It comes from the gaff down to the fish on the lighter? A. Yes.

Q. About how long is that?

A. Well, about 40 feet.

Q. About 40 feet? A. Yes, sir. [48]

Q. And that is on the top of the fish?

A. It is according to the water, if it is low water or high water.

Q. The lower part of the rope hooks into the bucket, does it not? A. It hooks into the bucket.

Q. There is no guy on the bucket, is there?

A. There is no guy on the bucket; no.

Q. When the bucket is lifted up there is nothing to prevent it from swinging, is there?

A. How can it swing when it is straight up and down.

Q. Doesn't it rest on the slippery fish?

A. It does not rest on the slippery fish at all; it is on the bare deck of the lighter.

Q. How could you see that from where you were on the deck?

A. Because, I could look right down, the same as I can look at this space.

Q. You were the donkey-man, were you?

A. No, I was bossing the work.

(Testimony of Max Luttich.)

Q. Who was attending to the fall?

A. The ship's carpenter.

Q. And where were you?

A. I was alongside the derrick.

Q. What were you doing there?

A. I was attending to the strapping line; when the bucket goes up, the donkey-man lets go the fall and that swings over the wharf.

Q. How can you swing that over the wharf unless the guyman slackens his rope?

A. Because the derrick has a lean to it, and when it gets up there, the man down below slacks it and the bucket goes clear.

Q. You say Larsen was standing on the fish with a pew in his hand?

A. I don't think he was standing on the fish, because the lighter is bare in places.

Q. He was standing with a pew in his hand, was he? A. Yes, sir. [49]

Q. And then he turned around suddenly and said he was hurt? A. Yes.

Q. How long have you been in the employ of the North Alaska Salmon Company? A. Since 1904.

Q. Are you going up this season? A. Yes.

Q. You have been up there every season since 1904, have you? A. Yes.

Q. In their employ?

A. In their employ; yes, sir.

[Testimony of Alexander Young, for Respondent.]

ALEXANDER YOUNG, called for the respondent, sworn.

Mr. FREIDENRICH.—Q. What is your occupation? A. Seaman and mate of the ship.

Q. Were you at the cannery of the libelor, the North Alaska Salmon Company, at Locanock, in the month of July, 1912?

A. Well, I was laying off there.

Q. You were there off and on? A. Yes, sir.

Q. Do you know Peter Larsen, the libelant?

A. Yes, I know him.

Q. Were you present at any time, or at a conversation between Peter Larsen and Mr. Hale, the superintendent? A. I was; yes, sir.

Q. After Mr. Larsen got hurt? A. Yes, sir.

Q. State what was said between them.

A. Well, I brought him up from the cannery, the last trip I made from the "Olympic" up to the cannery, and I was up on the platform when Mr. Hale came down to the cannery platform, the bookkeeper and I and Mr. Hale were talking at the time. Larsen came along at the time and Mr. Hale stopped talking to me at that time and he turned around to [50] Larsen and asked him how he was, if he was getting any better, or what, and he said, no, he didn't think he was getting much better—he was about the same. Well, he allowed he would like to see another doctor. He said there was another doctor at Koggiung. Mr. Hale turned around to the bookkeeper and he said, "All right, you get the launch and take

(Testimony of Alexander Young.)

this man to Koggiung to see the doctor any time he wants to go, and send the bill to me; I don't care for a few dollars if it will do the man any good." That is all I know about it.

Q. When did the conversation occur?

A. Well, I think this was somewhere around the 21st or 22d of August. On the 19th I made my last trip. I think it was about the 20th. I know the next day that I went up to the ways. That is as near as I can remember.

Q. You were mate on the "Olympic" on the way down? A. Yes, sir.

Q. Was Larsen put to work on the way down?

A. No, sir.

Cross-examination.

Mr. WALL.—Q. What is your occupation now?

A. I am doing rigging work, now.

Q. Do you expect to go up with the North Alaska Salmon Company this season?

A. I don't know; I expect so, if they give me a job.

Q. Were you up there last season? A. Yes, sir.

Q. How long have you been going up there with them? A. Seven years.

Q. They will be starting out some time next month, won't they?

A. I don't know when they expect to start out; that is up to [51] the company.

Q. What did you say was your occupation up there in 1912?

A. I was *mater* of the steamer "Milwaukee" after I arrived up there *in* on the "Olympic"; then I took

(Testimony of Alexander Young.)

the "Milwaukee" and took her until we came home.

Q. The "Milwaukee" is a stern-wheel steamer?

A. Yes, sir.

Q. It is operated by the North Alaska Salmon Company? A. Yes, sir.

Q. What time did this conversation take place that you speak of?

A. Well, as near as I can recollect, it was about the 20th of August. The last trip that I made was on the 19th, and he came up with me at that time on that trip, Mr. Larsen.

Q. He came up from the "Olympic"?

A. He came up from the "Olympic," yes, sir.

Q. What was his condition then—did he have a cane or a crutch?

A. He always carried a stick; he was limping around the same as he always was; I didn't see much difference in him. I didn't see much of him, anyhow.

Q. What was the conversation that Hale had with him? Just what did Hale say to him at that time?

A. This man allowed he wanted to see the doctor at Koggiung; well, Mr. Hale says, "All right," and he turned around to the bookkeeper and said, "You get the launch and take this man to Koggiung to the doctor any time he wants to go, and send the bill to me"; he said, "I don't care for a few dollars if it does the man any good." Those are the words I heard and that is all I heard about it.

Q. Is that all that was said?

A. That was all that was said that I know of.

(Testimony of Alexander Young.)

Q. Did Larsen say anything further?

A. No, not that I remember; [52] I don't remember his saying anything at all in reply to that, whatever. I was not so much interested in it, anyhow.

[Testimony of C. P. Hale, for Respondent.]

C. P. HALE, called for the respondent, sworn.

Mr. FREIDENRICH.—Q. Mr. Hale, what is your occupation?

A. Superintendent of the North Alaska Salmon Company.

Q. What cannery are you superintendent of?

A. Three of them.

Q. In 1912, what cannery were you superintendent of?

A. Halliville—the name is Halliville and not Halliwell—Locanock and Agake.

Q. Were you up there at that time?

A. Yes, sir.

Q. You know Peter Larsen, the libelant, here?

A. Yes, sir.

Q. Do you remember the time that he was hurt?

A. Yes, sir.

Q. Did you learn of it on that day, the day that he was hurt?

A. They telephoned to me immediately after he was hurt; I was at the cannery above, about two miles from Locanock.

Q. You were at Halliville at the time?

A. Yes, sir.

Q. What, if anything, was done, as soon as you heard of it?

(Testimony of C. P. Hale.)

A. I immediately went over and got the doctor and sent him down there.

Q. Do you know the name of the doctor?

A. Yes, his name is—

Q. (Intg.) Doctor Hassett, was it not?

A. Yes, that is the doctor, Doctor Hassett.

Q. Let me ask you, did Doctor Hassett come back with you on that trip?

A. He came back with the ship I sent him up on.
[53] He didn't come back with me.

Q. Do you know where he is now?

A. No, I don't know where he is now.

Q. Have you hunted for him since this suit began?

A. Yes, sir, we tried to locate him. We had him here both times before when the suit came up, but we cannot locate him now, this last time.

Q. When did you see Mr. Larsen after he was hurt the first time?

A. I seen him several days after he was hurt.

Q. Several days after that?

A. Yes; I don't remember whether it was three or four, or five days.

Q. And between that and the 20th of August, how often did you see him?

A. I used to visit that cannery about three or four times a week.

Q. Three or four times a week? A. Yes, sir.

Q. Mr. Hale, did he ever request that he be sent elsewhere?

A. Yes; after he licked the doctor, I went down

(Testimony of C. P. Hale.)

and saw him and I had a talk with him, and then he spoke about going to Koggiung; Koggiung is a little cannery about four miles below us. I offered to send him down there, let him have the launch, in fact, I instructed the bookkeeper and told the man that runs the launch to be ready and take him down in the morning; I told him he could go any time he wanted to. I said, as long as our doctor could not see him and satisfy him, I was perfectly willing he should go down and see the other doctor.

Q. What did he say?

A. He said, "Just as you say." I said, "It is not what I say, it is not what I say; it is whatever you want to do." I said, "Our doctor claims you don't want him to treat you, and you won't let him treat you." The doctor complained from the first time he went down there that this man didn't want him to treat him, and I had to keep making [54] the doctor go. I told him to go as often as necessary and do what he could for the man. After he had the row and he licked the doctor, the doctor didn't want to go any more.

Q. Did he have a row with the doctor?

A. He licked the doctor when he went down to treat him.

Q. Tell us about that.

Mr. WALL.—Q. Were you present at the time, Mr. Hale? A. No.

Mr. FREIDENRICH.—Q. Did Larsen tell you anything about it? A. Yes.

(Testimony of C. P. Hale.)

The COURT.—Well, he told us himself that he licked him.

Mr. WALL.—I am quite satisfied that he did, your Honor, but I don't see how this man can testify to it, if he did not see it.

Mr. FREIDENRICH.—Q. What did Larsen tell you about it?

A. He told me he licked the doctor because the doctor told him he ought to go to work.

Q. Did Mr. Larsen complain to you at any time that he was not being properly treated?

A. At that time he said he did not think the doctor understood his business.

Q. He complained of the doctor?

A. Yes, and then was the time I told him I was perfectly satisfied for him to go down and see the other doctor.

Cross-examination.

Mr. WALL.—Q. Just what did he say to you when he told you he licked the doctor?

A. Well, I could not repeat the exact words; he told me he licked the doctor.

Q. You say the doctor told you that Larsen didn't want him to treat him?

A. Yes, he told me that from the very first. [55]
I insisted on his going after the first time, I insisted on his going all the time, because it is my business to see that the doctor does go around and attend to these people.

Q. But the doctor told you from the very first that Larsen did not want *you* to treat him?

(Testimony of C. P. Hale.)

A. That Larsen acted like he did not want him to treat him at all.

Q. He told you that from the very first?

A. Yes, sir.

Mr. FREIDENRICH.—Q. Do you know anything about the qualifications of the doctor before you employed him?

A. Oh, yes; I looked up his reputation and got recommendations from many people. I made him show me his license, a New York license and a Nevada license—I am not sure that it was Nevada, but I know he had two State licenses; I did that to make sure he was the proper man for the business. I do that with every doctor.

Q. You hired him? A. Yes, sir.

Q. And you paid him of course, his regular wages?

A. I paid him his salary.

Mr. WALL.—Q. You did not see Larsen between the first of August and the 23d of August, did you, Mr. Hale?

A. I saw Larsen after he was hurt. I looked in the bunk-house. I only had one conversation with him, and that was the time I offered to send him to another doctor; that was either one or two mornings after he whipped the doctor.

Q. After he was hurt, how many days do you suppose it was before you first saw him?

A. I think two or three days; I visited the cannery, and I saw him sitting in the bunk-house.

Q. When did you next see him?

A. I could not say exactly.

(Testimony of C. P. Hale.)

Q. About what time?

A. Oh, probably two or three days. I don't know. When I go down there I always make it a habit of [56] going around the place to see what is going on in general. I had a foreman there to look after things, but it was my business to call there two or three times a week and see that everything was moving all right.

Q. After the first of August, you don't know how often you saw him? A. I could not say.

Q. Did you see him after the first of August, at all, in the bunk-house?

A. I don't know as to the date; I know that I seen him.

Q. Can you be sure you saw him at all between the first of August and the 23d of August?

A. Well, I would not say as to dates when I seen him. I know I saw him at that time, and this was after the fishing season, and that is always after the first of August.

Q. Can you say positively—

A. (Intg.) Yes, I saw him after the first of August.

Q. When?

A. The exact date I do not know, because my recollection is that I took the boats home, and I know that we were loading cases, and that we never ship out any cases until after I call the boats home, so I know it was after the first of August.

Q. Can you say positively there was no time during the season up there when you did not see Larsen

(Testimony of C. P. Hale.)

at least once every ten days?

A. No, I don't say that, but I always saw him practically every time I went down there.

Q. Every time you went down where?

A. Down to Locanock; if I didn't see him every time, I would see him every other time, because I always made it my habit to look into the bunk-house, to see who were laid up, and what was going on, who were idle. [57] It is my business to do that.

Q. Do you know that he was at Locanock right straight along during the season?

A. He went aboard the ship after the fishing season. I don't know the exact date. After he got down there, there was some trouble, something he did down there, and he was either sent ashore, or he came ashore—I know they sent him back to the cannery; they didn't want him at the ship.

Q. How did this conversation come about?

A. I commenced talking to him about the shipping of the doctor, and he told me the story.

Q. And you say you told the bookkeeper to let him have the boat when he wanted to go over?

A. I told the bookkeeper in the morning that if he wanted to go down to give him the launch and tell him to tell the launchman to be ready to take him.

Q. You told the bookkeeper to tell the launchman?

A. Yes, sir, and then I telephoned to the bookkeeper the next morning and asked him if he had the launch ready, and he said yes, but Larsen didn't want to go.

Q. Did Larsen suggest to you first that he wanted

(Testimony of C. P. Hale.)

to go to see some other doctor?

A. He talked about it, yes, and I told him I was willing, and I told him if he wanted to go, he could go, but he said, "It is up to you."

Q. Did you make any inquiries after that, to find out why he did not go?

A. I asked the bookkeeper if he went, and he said no.

Q. Did you ask the bookkeeper why he did not go?

A. No.

Q. Did you ask Larsen at the time why he did not go? A. No. [58]

[**Testimony of Thomas H. Evans, for Respondent.**]

THOMAS H. EVANS, called for the respondent. sworn.

Mr. FREIDENRICH.—Q. What is your occupation? A. I am captain of the bark "Olympic."

Q. And were you captain of the vessel in 1912?

A. Yes, sir.

Q. And you went up to the canneries, to Bristol Bay, did you? A. Yes, sir.

Q. For the libel in this case. A. Yes, sir.

Q. Do you know Peter Larsen? A. Yes, sir.

Q. Did you bring him back with you on that trip?

A. Yes, sir.

Q. Was he put to work at all on that trip?

A. Not on the trip down, he was not put to work, but he worked a little at Bristol Bay; he did not work on the trip down.

Q. He did not work on the trip down?

A. No, sir.

(Testimony of Thomas H. Evans.)

Q. Did he have any orders to go to work?

A. No, sir. He voluntarily went to work and repaired the sails.

Q. Whatever he did was voluntarily done by him?

A. Yes, sir.

Mr. WALL.—No cross-examination.

Mr. FREIDENRICH.—That is our case. We rest.

**[Testimony of Peter Larsen, in His Own Behalf
(Recalled in Rebuttal).]**

PETER LARSEN, recalled in rebuttal.

Mr. WALL.—Q. You heard the testimony in regard to the inability of that bucket to swing; explain to the Court how [59] the bucket was rigged, and how it was operated.

A. There is a derrick on the wharf, with a swinging gaff attached to it. The fall goes through a loading block at the foot of the derrick, and up to the gaff, and down to the bucket where we throw the fish in. Attached to this gaff is a guy, which leads over to one corner of the lighter; to get the bucket in, the gaff has to swing in on the wharf to dump the fish, and they have to slack the guy to swing that gaff in, and they have to haul the gaff out again. It is a swinging gaff. They have to hoist the bucket up, and they lower the bucket down. They have to haul the gaff out. Every time the bucket is filled, they have to swing the gaff in.

Q. It is impossible for the fish *to landed* on the wharf without the guy being slacked off, is it not?

A. It is absolutely impossible. When we land the

(Testimony of Peter Larsen.)

bucket down in the fish lighter, we still shove the bucket a little further, according to where the fish are in the lighter, and that gives it a swing.

Q. You heard Mr. Hale's testimony about the conversation when the mate was present, the conversation he had with you?

A. I did not see Captain Young when I spoke to Mr. Hale.

Q. You heard what Mr. Hale said about that conversation? A. Yes, sir.

Q. Did Mr. Hale, in your presence, say anything to the bookkeeper about getting the launch?

A. He may have told him afterwards, but in my presence he did not.

Q. You did not hear him say anything to the bookkeeper about the launch?

A. No, sir. He promised me to attend to it, and to send me to one place or the other as soon as I get my steamers here. [60]

Q. Did you tell him, "That is up to you"?

A. I said, "It is up to you, Mr. Hale, to take care of me; it is up to you to get me to some doctor where I can get treatment because that doctor won't do nothing for me; he claims there is nothing the matter with me."

Q. Did he, in your presence, give the launchman any orders that you could use the launch?

A. No, sir. There was no one there at the time. I spoke to Mr. Hale in the cannery—except the bookkeeper; the bookkeeper was there.

(Testimony of Peter Larsen.)

Q. Did you tell the bookkeeper at any time that you did not want to go?

A. No. I went down to the little house a couple of times and asked them if the launch was there yet to take me away, and he said, "No; we have no launches to spare."

Q. Who is the bookkeeper?

A. A fellow named Long—I have forgotten his name.

Q. Was it Young? A. I believe so.

Q. As I understand you, you never at any time told the bookkeeper you didn't want to go, or didn't want to use the launch? A. No, sir.

Q. Did you ever tell anybody you didn't want to go?

A. No, sir. Why should I tell anybody I didn't want to go when I went to the superintendent and told him I did want to go—why should I tell him I didn't wish to go?

Mr. FREIDENRICH.—No questions.

Mr. WALL.—That is the case.

(After argument by counsel, the cause was submitted to the Court for decision.)

[Endorsed]: Filed May 20, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [61]

*In the District Court of the United States, in and for
the Northern District of California, First Di-
vision.*

PEDER LARSEN,

Libelant,

vs.

NORTH ALASKA SALMON COMPANY, a Cor-
poration,

Libelee.

Deposition of Sigurd Andersen [for Libelant].

BE IT REMEMBERED that on Wednesday, March 12th, 1913, pursuant to stipulation of counsel hereunto annexed, at the office of F. R. Wall, Esq., in the Merchants' Exchange Building, in the City and County of San Francisco, State of California, personally appeared before me, Francis Krull, a United States Commissioner for the Northern District of California, to take acknowledgments of bail and affidavits, etc., Sigurd Andersen, a witness produced on behalf of the libelant.

F. R. Wall, Esq., appeared as proctor for the libelant, and D. Freidenrich, Esq., appeared as proctor for the libelee, and the said witness, having been by me first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth in the cause aforesaid, did thereupon depose and say as is hereinafter set forth. [62]

(It is hereby stipulated and agreed by and between the proctors for the respective parties that the deposition of Sigurd Andersen may be taken

(Deposition of Sigurd Andersen.)

de bene esse on behalf of the libelant, at the office of F. R. Wall, Esq., in the Merchants' Exchange Building, in the City and County of San Francisco, State of California, on Wednesday, March 12th, 1913, before Francis Krull, a United States Commissioner for the Northern District of California, and in shorthand by Herbert Bennett.

It is further stipulated that the depositions, when written out, may be read in evidence by either party on the trial of the cause; that all questions as to the notice of the time and place of taking the same are waived, and that all objections as to the form of the questions are waived unless objected to at the time of taking said depositions, and that all objections as to materiality and competency of the testimony are reserved to all parties.

It is further stipulated that the reading over of the testimony to the witness and the signing thereof is hereby expressly waived.) [63]

SIGURD ANDERSEN, called for the libelant, sworn.

Mr. WALL.—Q. Give your full name, Andersen.

A. Sigurd Olgar Andersen.

Q. What is your business, what do you do for a living? A. Sailor.

Q. How long have you been a sailor?

A. I have been sailing since I was 15 years old. I am 28 now. 13 years I have been sailing.

Q. Were you up in Alaska last season?

A. Yes, sir.

(Deposition of Sigurd Andersen.)

Q. What vessel did you go up on?

A. The barkentine "Olympia."

Q. Where did you work that summer?

A. In Branch River.

Q. Branch River, Alaska? A. Yes, sir.

Q. For whom? A. Haller.

Q. Did you know Peter Larsen up there?

A. Yes, sir.

Q. Did he go up on the same boat?

A. Yes, sir.

Q. Tell what you know yourself, what you saw yourself, or heard yourself, if anything, about what happened at the time that Peter Larsen got hurt.

Mr. FREIDENRICH.—That is assuming that he was hurt.

Mr. WALL.—Q. Assuming that he was hurt, yes.

Mr. FREIDENRICH.—That is objected to upon the ground that it is assuming a fact not in evidence.

A. Peter Larsen was throwing fish over to the fish tub.

Mr. WALL.—Q. Where were you at the time?

A. I was on the lighter, attending to the guy.

[64]

Q. Where was Peter Larsen?

A. He was on the lighter.

Q. You were on the lighter?

A. Yes, sir, I was on the lighter, on the end of the lighter.

Q. Whereabouts on the lighter were you working?

A. I was working on the aft end.

Q. On the aft end? A. Yes, sir.

(Deposition of Sigurd Andersen.)

Q. And whereabouts on the lighter was Peter Larsen? A. About amidships.

Mr. WALL.—Mr. Freidenrich, are there any of the people who are present here, that are going to be witnesses?

Mr. FREIDENRICH.—They were not present, but one of them will be a witness. Mr. Hale was not present at the time of the accident, but will be a witness.

The WITNESS.—The tub was full of fish.

Mr. WALL.—Q. What were you doing on there?

A. I was attending to the guy.

Q. What were the others doing?

A. Throwing fish from the lighter in the tub.

Q. Where was the lighter at the time?

A. Alongside of the wharf.

Q. Alongside of what wharf?

A. The fish wharf.

Q. Whereabouts?

A. Right in front of the derrick.

Q. The fish wharf for what cannery?

A. Branch River.

Q. Was the lighter afloat or aground at the time of the accident?

A. It always used to be afloat there most of the time; I guess it must have been afloat; that I would not say for sure.

Q. How were the fish being landed on the wharf, if they were landed on the wharf?

A. They hoist the fish up in the tub [65] with steam and dump it into the fish wharf.

(Deposition of Sigurd Andersen.)

Q. Where did you say Larsen was standing at the time? A. Very close to the tub.

Q. And what was the condition of the deck of the lighter as to the amount of fish that was on the lighter? A. The lighter was about half full.

Q. And state what was the condition of the lighter as to fish where Larsen was standing.

A. He was standing in fish to above his knees.

Q. Now, go ahead and state just exactly what happened as far as you know yourself.

A. They was going to heave the tub up and Peter Larsen was standing very close to the tub so he made a quick move and he twisted his knee.

Q. What was done with him, if anything?

A. He would have stood a chance to get hurt with the tub, I guess, if he had not moved; still he did not move very far.

Q. And what was done with him afterwards, if anything?

A. A couple of men there helped him to get over the rail to the lighter, I guess. I don't remember if they heaved him up on the wharf or not. I don't think they heaved him up; they pulled him up. I don't know; I don't remember that.

Q. You did not take part?

A. No, sir; I was attending to my guy. I did not stop work. A couple of men stopped work, and he got brought up to the bunk-house.

Q. How was this lighter made fast, or secured to the wharf?

A. The lighter was secured with lines fore and aft; good lines; good enough to hold.

(Deposition of Sigurd Andersen.)

Q. Fore and aft? A. Yes, sir.

Q. What, if you know, was the manner in which the different [66] lighters were unloaded? Was there more than one lighter there at the time?

A. Yes, sir, there was a lighter in each end; one above the wharf and one below the wharf. They always used to be that way.

Q. After they got one lighter unloaded, what was done with that lighter?

A. They dropped the lighter astern, or ahead and made them fast alongside of the line of piles.

Q. What did they do, if anything, about putting another lighter in position to unload?

A. They slacked another lighter either down or up to the wharf.

Q. Now, state, if you know how the fish were loaded on board of these lighters; how the fish were first put on board before they were unloaded.

A. The fish boats come alongside the boat and the fish is thrown to the lighter.

Q. State whether or not that was done all the season through, or whether any different way was followed at any other part of the season.

A. No, sir; we always throw the fish over to the lighter.

Q. And where were the lighters taken to get the fish?

A. It was laying either alongside of the wharf or above the wharf or below the wharf.

Q. Was the same method followed in the spring and in the fall all of the way through?

A. No, sir; in the spring they had a lighter laying

(Deposition of Sigurd Andersen.)

down in Koggiung; that only lasted for a few days.

Q. What did they do with the lighter down there?

A. The fishermen come alongside of them and discharge fish into the lighter.

Q. Then after the lighter was loaded up, what did they do [67] with her?

A. They towed it up to Branch River, up to the cannery.

Q. How far was that from Branch River, Koggiung, where the lighters were taken?

A. Somebody said 20 or 30 miles; I could not tell you.

Q. Somewhere about 20 or 30 miles?

A. Yes, sir; 20 miles.

Q. When you shipped to go up north, how did you ship?

A. I went up to the Haller office and got the job.

Q. What were the terms that you shipped under?

A. To go up there as a fisherman.

Q. Did you have anything to do?

A. And to take the ship up and down.

Q. You acted as sailor going up and down?

A. Yes, sir.

Q. And after you go up there, how do you fish?

A. We fish two men in each boat.

Q. Two men in each boat? A. Yes, sir.

Q. Did you do any fishing in the boats while you were there? A. Yes, sir, very little though.

Q. Very little?

A. Yes, sir; I was ashore most of the time.

Q. When you worked on shore, what basis would you work on as to compensation?

(Deposition of Sigurd Andersen.)

A. I was working with a winchman up there sorting fish; he was like the beach boss.

Q. Were you paid regular wages for that, or did you get a part of the catch?

A. I was paid the limit.

Q. What do you mean by paid the limit? What does that mean, you were paid the limit?

A. That is the limit which we can fish. The limit is 1,200 fish a day.

Q. That is, you get the same rate of compensation as the highest catch. Is that the idea?

A. Yes, sir, and the highest catch is 1,200 fish.
[68]

Q. At the time that you say Larsen was hurt was the tub then loaded? A. The tub was loaded then.

Q. State whether or not they had started to hoist the tub up at that time.

A. Yes, sir, the tub went up and Peter Larsen he made a quick move.

Q. Where did they take Larsen after the accident, if you know?

A. They took him up to the bunk-house.

Q. About what time of day was it when the accident happened?

A. Oh, I guess, it was about around three or four o'clock in the afternoon.

Q. Were you up to the bunk-house after they took Larsen up there?

A. Yes, sir, I was up there after supper and the time the doctor came there I was there.

Q. About what time did the doctor get there?

A. We had supper; just after supper; around sup-

(Deposition of Sigurd Andersen.)

per-time, about half-past six or seven o'clock in the evening.

Q. Well, now, tell what happened after the doctor came there that day, the day that Larsen got hurt.

A. The doctor he looked at his knee and felt around and made Mr. Larsen move his leg; he could not do it and the doctor he said, "I cannot see anything wrong with your knee whatsoever," and they give him some kind of a liniment to rub on his knee and he told him he would be all right in the morning, and he gave him a couple of pills, and Peter Larsen said, "I am glad to hear it." He said, "I am going to be good in the morning."

Q. Did you see the doctor in the bunk-house again after that? A. Yes, sir, I saw him.

Q. About how long was it after that that you saw him the *the* next time in the bunk-house?

A. Three or four days, or five days, it might be. I could not tell. [69]

Q. Do you remember about what time of the month it was? A. About the middle of July, I guess.

Q. What time was that in the daytime?

A. That is at the last time? After supper-time it was.

Q. Tell what was said or done then as far as you know.

A. He looked at his knee again; he could not find nothing wrong with his knee whatsoever.

Q. What did he say?

A. The doctor he said there was nothing else but laziness with him, "You don't want to work," and the beach boss was there and after he got orders from

(Deposition of Sigurd Andersen.)

the doctor to turn him to.

Q. Just what did the doctor say to the beach boss, as nearly as you can remember?

A. *He* doctor he said, "Maxey, this fellow is lazy; turn him to and give him plenty of work." That is what he said, "And if he don't want to work, why I will go over and tell the old man Haller about him," he said.

Q. Do you live in the bunk-house?

A. Yes, sir.

Q. The same bunk-house where Larsen was?

A. Yes, sir.

Q. How much time did you generally spend in the bunk-house? A. Meal times and at night.

Q. State whether or not you ever saw the doctor in the bunk-house after that.

A. No, sir, I did not see him any more.

Mr. WALL.—I think that is all.

The WITNESS.—That is all I can tell about it.

Cross-examination.

Mr. FREIDENRICH.—Q. You say that you and Larsen were on the lighter at the time that the accident occurred? A. Yes, sir.

Q. Who else was on the lighter?

A. There was all—I don't remember just exactly the men who were on the lighter. There [70] was a couple of fishermen and a couple of beachmen who was working on the beach all the time, beach gang.

Q. About how many men altogether were on the lighter? A. Six or seven men, I guess.

Q. What were you doing at the time?

(Deposition of Sigurd Andersen.)

A. I was attending to the guy.

Q. What was Peter Larsen doing?

A. He was throwing fish up in the tub from the lighter into the tub.

Q. That is the tub was on the lighter?

A. Yes, sir.

Q. And the fish were all around the tub?

A. Yes, sir.

Q. And he was filling the tub with the fish?

A. He and the rest of them.

Q. What methods were employed in doing that? Did they use their hands or anything else?

A. They had something like a pew, a broom handle with a big nail at the end, a bent nail.

Q. What do you call it—a pew? A. Yes, sir.

Q. That was the implement which they had for the purpose of taking the fish from the lighter and putting them in the tub? A. Yes, sir.

Q. And when the tub was filled with the fish what was the next thing that was done?

A. They hoisted them up with steam.

Q. Was there a signal given?

A. The beach boss blew the whistle to the donkeyman who was driving the donkey.

Q. At the time that you say the accident occurred to Peter Larsen how far were you standing from him?

A. He was about in the middle of the lighter and I was on the end. I don't remember how long the lighter is.

Q. And what is the length of the lighter?

A. I could not [71] tell you.

(Deposition of Sigurd Andersen.)

Q. About what is the length?

A. Oh, it is about 50 feet, I guess.

Q. About 50 feet in length? A. Yes, sir.

Q. And how many feet in width?

A. It is about 18 or 20, I guess.

Q. Twenty feet in width? A. Yes, sir.

Q. The tub was in the middle of the lighter?

A. Yes, sir.

Q. And Peter Larsen was standing by the tub?

A. Yes, sir.

Q. And you were at the end of the lighter?

A. Yes, sir.

Q. You were then about 25 feet from him, were you not? A. Yes, sir, about 25 feet.

Q. What, if anything, was there between Peter Larsen and you at that time—was there any obstruction at all?

Mr. WALL.—He probably does not know what obstruction means.

Mr. FREIDENRICH.—Q. Was it all open so that you could see? A. Everything was open.

Q. Everything was open; there was no obstruction, no building on the lighter, no house or anything like that? A. No, sir; everything was open.

Q. Everything was open? A. Yes, sir.

Q. And you stood at the end of the lighter with a guy rope in your hand, did you? A. Yes, sir.

Q. What first attracted you towards Peter Larsen upon that occasion?

A. The first I saw he done was try to turn and twist himself clear of that tub. He tried to get out of the road of the tub.

(Deposition of Sigurd Andersen.)

Q. He tried to get out of the road of the tub?

A. Yes, sir. [72]

Q. Was the tub swinging at the time?

A. Well, sir, we had to swing it in. As soon as they started to swing in the tub the fellow on the guy had to slack the tub in on the stern.

Q. How far from the deck of the lighter was the tub at the time?

A. It might be a foot or a foot and a half.

Q. The tub was about a foot or a foot and a half?

A. It was standing on the fish when they started to hoist it.

Q. The tub was standing on the fish?

A. Yes, sir.

Q. Now, I will ask you how far was the tub from the fish on which it had rested at the time when Peter Larsen tried to get out of its way?

A. Peter Larsen he tried to get out of its way as soon as the tub went up.

Q. He tried to get out of its way as soon as it went up? A. Yes, sir, he did not have no chance.

Q. At that time the tub was how far from the deck of the lighter?

A. It would take a second or two for the tub to go up. It goes up like a shot.

Q. It goes up like a shot?

A. It goes up pretty fast.

Q. It don't take a second then, does it?

A. It goes up pretty fast.

Q. It goes up pretty fast? A. Yes, sir.

Q. Did you see the tub strike Peter Larsen?

A. No, sir, it never struck him.

(Deposition of Sigurd Andersen.)

Q. The tub did not strike Peter Larsen?

A. No, sir.

Q. The tub did not strike him on the knee or on any other part of his body? A. No, sir.

Q. But you say Peter Larsen made a quick move?

A. Yes, sir.

Q. What do you mean by that?

A. Well, he tried to get clear of the tub. [73]

Q. He tried to get clear of the tub and he did get clear of the tub? A. Yes, sir.

Q. How soon after that was it that he complained?

A. Right away. He hollered right away he twisted his knee; that is the first he said.

Q. He twisted his knee?

A. That is what he said.

Q. That is what he said?

A. That is the first he said. "I hurt myself," or "I hurt my knee," or "twisted my knee." I could not exactly say.

Q. What did he say?

Mr. WALL.—He just said that he could not exactly say.

A. I cannot say that; I was standing on the other end of the lighter; I could not say exactly but somebody said, "Pete got hurt."

Q. Somebody said "Pete got hurt"?

A. Yes, sir.

Q. But you did not hear him, referring to Peter Larsen, say anything at all?

A. I guess it was Pete that said that; I am not sure.

Q. You guess. Are you prepared to say that he did say that?

(Deposition of Sigurd Andersen.)

A. That is not for me to say that. I could not say he said it. There were lots of fellows there. Somebody said, "Pete got hurt," if it was him that hol-lered.

Q. You are not prepared to say whether Peter Larsen said he got hurt or not? A. Yes, sir.

Q. I mean at the time that your attention was first called to him?

A. No, sir, I would not say that he said anything so I heard it.

Q. Afterwards when your attention was called to him then what did he say?

A. He said he twisted his knee; "My knee is twisted."

Q. He said he twisted his knee?

A. "My knee is twisted." [74]

Q. He said, "My knee is twisted"?

A. I could not tell you exactly what he said.

Q. You will not be certain what he did say?

A. No, sir.

Q. And you cannot be certain of what he did complain of at that time, can you?

A. Not right away.

Q. And you say this occurred in the afternoon?

A. Yes, sir, between three and four.

Q. What day was it, do you remember?

A. No, sir; I could not remember that.

Q. How many days after you started in to fish did this occur?

A. That is what I could not tell you. I don't remember the date.

Q. You cannot recall even the month, can you?

(Deposition of Sigurd Andersen.)

A. Yes, sir, it was in the month of July.

Q. It was in the month of July?

A. Yes, sir, about the middle of July.

Q. What did Peter Larsen do after complaining that he had been hurt?

A. Some of the boys they helped him to get out of the lighter to get him on the wharf.

Q. How did they manage to get him on the wharf?

A. I don't think they heaved him up; I cannot remember if they heaved him up or not. I guess he managed to get up by the ladder we had alongside.

Q. What is your best impression of that?

A. I will not say; I would not say nothing about it. It might be they took him in a boat and took him on the beach.

Q. You don't remember how they got him from the lighter on to the wharf? A. No, sir.

Q. Whether they hoisted him up, or whether he got up on the ladder, or any other way, you don't know? [75] A. I could not tell you.

Q. State what were the different methods of getting from the lighter to the wharf; one was by being hoisted? A. Hoisting up with steam.

Q. Hoisting up with steam? A. Yes, sir.

Q. And the other way by ladder? A. Yes, sir.

Q. How far below the wharf was the ladder?

A. I don't know; I could not tell you.

Q. At that time, I mean?

A. That is what I could not tell you.

Q. Can't you tell about how many feet?

A. No, sir.

Q. The ladder was not on the level with the wharf?

(Deposition of Sigurd Andersen.)

A. No, sir, it was pretty low water.

Q. Pretty low water? A. Yes, sir.

Q. But you cannot tell how many feet below the wharf the ladder was? A. No, sir.

Q. You cannot tell how high a ladder the ladder was?

A. The ladder was nailed fast to the wharf.

Q. The ladder was nailed to the wharf?

A. Yes, sir.

Q. And you simply went to the end of the lighter and got on the ladder and stepped up?

A. Yes, sir.

Q. And you cannot tell whether Peter Larsen went up that ladder or not?

A. I did not stop work whatsoever to get him up.

Q. You did not stop work?

A. No, sir, two of them did, because two of them stopped work to get him off the lighter and get him up on the wharf.

Q. Did those two come back again on the lighter, or did they take him to the bunk-house?

A. Well, I was not up on the wharf whatsoever.

Q. You were not on the wharf?

A. No, sir. [76]

Q. You don't know how he got to the bunk-house?

A. No, sir.

Q. How far was the bunk-house from the wharf?

A. It was about—that is a pretty good distance from the wharf.

Q. What is the distance?

A. About half a mile, I guess.

Q. From the bunk-house to the wharf?

(Deposition of Sigurd Andersen.)

A. Yes, sir.

Q. How he got to the bunk-house you don't know?

A. I know somebody told—

Q. (Intg.) I don't want to know what anybody told you. How he got to the bunk-house at that time you don't know? A. I don't; I did not see.

Q. When you talk of a bunk-house, what do you mean by that? A. Bedrooms, where we sleep.

Q. A room with bunks on the side for the use of the sailors? A. Yes, sir, one room.

Q. A frame building; a secure frame building?

A. Yes, sir.

Q. Covered? A. Yes, sir.

Q. Now, you saw Peter Larsen, you say, later that day? A. Yes, sir.

Q. About six o'clock? A. Six o'clock; yes.

Q. And you saw the doctor there about half-past six? A. Yes, sir, about half-past six.

Q. Who else was in the bunk-house at the time the doctor came there?

A. Oh, there was pretty nearly the whole crowd.

Q. The work was stopped for the day?

A. The work was stopped for the day; yes.

Q. Was Peter Larsen in his bunk at that time?

A. No, sir; he was sitting on the bench outside his bunk. [77]

Q. He was sitting on the bench outside of his bunk? A. Yes, sir.

Q. But inside of the bunk-house?

A. Yes, sir, inside of the bunk-house.

Q. The doctor was examining his leg?

A. Yes, sir.

(Deposition of Sigurd Andersen.)

Q. Which leg, the right or left?

A. Well, I don't remember that either.

Q. You don't remember that? A. No, sir.

Q. His clothes were off, I suppose, were they,
Peter Larsen's?

A. He took his clothes off and the doctor came in.

Q. He took his clothes off and the doctor came in?

A. The doctor told him to take his pants down.

Q. When you were up and saw him at six o'clock
he had his clothes on at that time, did he?

A. Yes, sir.

Q. You don't know whether he made any examination
of his knee before that time or not, do you?

A. He did not. He just came from his office at
that time.

Q. I mean Peter Larsen himself?

A. I don't know because I was working.

Q. Now, the doctor examined his leg and examined
his knee in your presence? A. Yes, sir.

Q. And you, of course, looked at the knee, didn't
you?

A. Yes, sir, they were standing around looking at
his knee.

Q. You were all standing around looking at it?

A. Yes, sir.

Q. And the doctor made some tests, did he?

Mr. WALL.—I do not think he understands what
tests mean.

Mr. FREIDENRICH.—Q. Tell me what the doctor
did besides looking at the leg.

A. He felt all around his knee.

Q. What else?

(Deposition of Sigurd Andersen.)

A. And made him move his leg, but he could not
[78] do it.

Q. He made him move his leg but he could not do
it? A. Just a very little he could move it.

Q. But he could move it some? A. Yes, sir.

Q. Larsen was sitting at the time? A. Yes, sir.

Q. He was not lying in his bunk?

A. The time the doctor was there he was standing
on one foot.

Q. He was standing on one foot?

A. That time the doctor had his hand on his knee
examining it.

Q. And the doctor said at the time that he could
not see anything the matter with him?

A. Yes, sir.

Q. There was no wound apparent as far as you
know on the knee was there?

A. No, sir, there was nothing wrong as far as I
could see.

Q. Did the doctor give him any medicine?

A. Yes, sir; he rubbed some kind of a liniment on
his knee and he gave him a couple of pills and he
told him "You will be all right in the morning."

Q. How soon after that was it when Larsen went
to his bunk to lie down?

A. Well, that I don't remember. I did not stay
there to watch him after that.

Q. I thought you were off duty at that time?

A. I was off duty, but I always used to take a
walk around the woods every night.

Q. You did not stay in the bunk-house?

A. No, sir.

(Deposition of Sigurd Andersen.)

Q. Did you see Larsen again that evening?

A. Yes, sir. Then he was lying in his bed.

Q. You saw him in the bunk-house lying in bed?

A. Yes, sir.

Q. And you saw him the next morning?

A. Yes, sir the next [79] morning.

Q. And you saw him the next day?

A. Yes, sir, the next day.

Q. Now, you say the doctor came again in three or four days? A. Three or four days after that.

Q. Were you present at the time?

A. I was there at the time.

Q. What did the doctor do the second time, on this second visit?

A. All he done he felt around his knee, but he could not find anything the matter with his knee whatsoever.

Q. He could not find anything the matter with his knee whatsoever?

A. Yes, sir, he said, "All you need to do is to work."

Q. All you need to do is to go to work, he said?

A. That is all.

Q. Did he give him any medicines the second time?

A. Yes, sir, he did give him another couple of pills.

Q. He gave him more pills? A. That is all.

Q. Did he give him any liniment to rub?

A. No, sir, he did not. That is all he got.

Q. He simply gave him a couple of pills?

A. Yes, sir.

Q. But did not rub his knee with liniment?

A. Not the second time.

(Deposition of Sigurd Andersen.)

Q. At the second time did he tell Larsen to try to move his knee?

A. The same way as the first time.

Q. And Larsen could not move?

A. He could move a little.

Q. Was Larsen in his bunk lying down?

A. No, sir, he was sitting outside of his bunk at the time the doctor came.

Q. Sitting on his bunk with his clothes on?

A. No, sir.

Q. That is he was sitting outside of his bunk inside the bunk-house?

A. Yes, sir, inside the bunk-house. [80]

Q. You say you saw Larsen the day after the accident? A. Yes, sir.

Q. Was he lying in his bunk?

A. Most of the time he was lying in the bunk.

Q. I mean the day after.

A. He was not working and I was working and at meal time he was generally sitting up.

Q. At meal time he was generally sitting up?

A. Yes, sir.

Q. What time did you leave the bunk-house to go to work?

A. We leave the bunk-house in the morning at six o'clock,

Q. Now, when did you again return to the bunk-house during the day?

A. At 12 o'clock, I guess. I don't think we had any meal time before 12. We had coffee time.

Q. That is you would go back to the bunk-house to get your meals?

(Deposition of Sigurd Andersen.)

A. No, sir, we had a dining-room alongside the bunk-house.

Q. So that you would go there to get your meals and you would stop in the bunk-house?

A. Yes, sir. I would stop in the bunk-house and have a smoke.

Q. And you left there after lunch at what time?

A. One o'clock.

Q. And returned for supper at what time?

A. About six o'clock or a little before that.

Q. Now, the day after the accident did you see Larsen before you went to work?

A. Yes, sir, I did see him.

Q. Where was he at that time?

A. He was in the bunk-house.

Q. In his bunk? A. Yes, sir.

Q. Did you see him when you came back for dinner at noon? A. Yes, sir. [81]

Q. Where was he at that time?

A. He was in the bunk-house.

Q. In his bunk?

A. That is what I could not tell you if he was in the bunk.

Q. You don't know if he was in his bunk or whether he was sitting on the bench outside of his bunk? A. No, sir.

Q. Now, in the evening when you returned where did you find Larsen?

A. Well, I find him in the bunk-house again.

Q. Was he in his bunk, or sitting outside of his bunk?

(Deposition of Sigurd Andersen.)

A. I could not tell you. He was not lying down all the time.

Q. He was not lying down?

A. No, sir, he was able to sit up, sit on the bench.

Q. He was able to sit on the bench with his clothes on?

A. Yes, sir, he had made himself a stick so that he could walk over and get his meal.

Q. Now, to get back again to the time of the accident you say that you did not stop work after the accident, you continued right along with your work hoisting the fish to the deck, didn't you?

A. Yes, sir. We finished the lighter. We heaved all the fish up.

Q. And you don't remember hoisting Larsen from the lighter to the deck?

Mr. WALL.—That is only going over what he has *been* already been over thoroughly. He said he could not tell whether Larsen was hoisted up or whether he went up the ladder, or whether he was taken in a boat.

Mr. FREIDENRICH.—Q. You don't recall whether he was hoisted up?

Mr. WALL.—He said he did not. [82]

A. He was not hoisted up.

Mr. FREIDENRICH.—Q. You would certainly know—you now are certain that he was not hoisted up?

A. I said that he could get up two other ways; put him on the boat and pull him on the beach, or take up the ladder.

Q. You are sure now he was not hoisted up?

A. No, sir, he was not hoisted up because they hoisted the tub up. [83]

**[Certificate of U. S. Commissioner to Deposition of
Sigurd Andersen.]**

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

I, Francis Krull, a United States Commissioner for the Northern District of California, do hereby certify that the reason stated for taking the foregoing deposition is that the testimony of the witness, Sigurd Andersen, is material and necessary in the cause in the caption of the said deposition named and that he is bound on a voyage to sea and will be more than one hundred miles from the place of trial at the time of trial.

I further certify that on Wednesday, March 12th, 1913, I was attended by F. R. Wall, Esq., proctor for the libelant, and by D. Freidenrich, Esq., proctor for the libelee, and that the witness was by me first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth in said cause; that said deposition was, pursuant to the stipulation of the proctors for the respective parties hereto, taken in shorthand by Herbert Bennett, and afterwards reduced to typewriting; that the reading over and signing of said deposition of the witness was by the aforesaid stipulation expressly waived.

I do further certify that I have retained the said deposition in my possession for the purpose of de-

livering the same with my own hand to the United States District Court for the Northern District of California, the Court for which the same was taken.

And I further certify that I am not of counsel nor [84] attorney for any of the parties in the said deposition and caption named, nor in any way interested in the event of the cause named in the said caption.

IN WITNESS WHEREOF, I have hereunto subscribed my hand at my office in the City and County of San Francisco, State of California, this 28th day of May, 1913.

[Seal] FRANCIS KRULL,
U. S. Commissioner, Northern District of California,
at San Francisco.

[Endorsed]: Filed May 28, 1913. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [85]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Thursday, the 30th day of April, in the year of our Lord one thousand nine hundred and fourteen. Present: the Honorable M. T. DOOLING, District Judge.

No. 15,354.

PEDER LARSEN,

Libelant,

vs.

NORTH ALASKA SALMON COMPANY, a Corporation.

Minutes—Order for Entry of Decree in Favor of Libelant.

The Court this day filed its written opinion and order that a Decree be entered for the sum of \$506.00, and costs in favor of libelant. [86]

In the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,354.

PEDER LARSEN,

Libelant,

vs.

NORTH ALASKA SALMON CO., a Corporation,
Libelee.

Opinion and Order to Enter Decree for Libelant for the Sum of \$506.00 and Costs.

F. R. WALL, Proctor for Libelant.

D. FREIDENRICH, Proctor for Libelee.

I am satisfied from the evidence herein that the libelee did not furnish libelant with proper medical attention and care after his injury, as the doctor at all times seemed to regard libelant's injury as trifling and libelant himself as a malingerer. It is evident, however, that the injury to libelant's knee was a grave one, which if properly treated at once would not have resulted so seriously. He was compelled after his arrival here to incur an expense of \$86.00 for doctor's fees and \$15.00 for medicines. He was also unable to work for a period of 4½ months

after his discharge from the vessel—during which time he could have earned about \$405.00. If he had received proper treatment at the time of his injury and up to the end of the voyage home, nothing would [87] be allowed him for expenses or losses thereafter.

Under the circumstances, however, a decree will be entered for \$506.00 and costs.

April 30th, 1914.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Apr. 30, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [88]

At a stated term of the United States District Court,
in and for the Northern District of California,
First Division, held at the courtrooms in the
United States Courts and Postoffice Building,
in the City and County of San Francisco, State
of California, on the 2d day of May, 1914.
Present: Honorable M. T. DOOLING, District
Judge.

No. 15,354.

PEDER LARSEN,

Libellant,

vs.

NORTH ALASKA SALMON CO., a Corporation,
Libelee.

Final Decree.

This cause having been heard on the pleadings
and proofs, and having been argued and submitted

by the advocates and proctors for the respective parties, and due deliberation having been had, it is now by the Court Ordered, Adjudged and Decreed that the libelee in said cause, North Alaska Salmon Co., a corporation, pay to the libelant, Peder Larsen, the sum of five hundred and six dollars (\$506.00), together with interest on said sum from the 21st day of December, 1912, the date of the filing of the libel herein, and libelant's cost to be taxed.

M. T. DOOLING,
District Judge.

[Endorsed]: Filed May 2, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [89]

*In the District Court of the United States in and for
the Northern District of California, First Division.*

No. 15,354.

PEDER LARSEN,

Libelant,

vs.

NORTH ALASKA SALMON COMPANY, a Corporation,

Libelee.

Notice of Appeal.

To Peder Larsen, Libelant Herein, to F. R. Hall, Proctor for Libelant, and to W. B. Maling, Clerk of the District Court of the United States, for the Northern District of California, Division I:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE, that North Alaska Salmon Co., a corporation, libelee herein, hereby appeals to the

United States Circuit Court of Appeals for the Ninth Circuit, from the final decree of the District Court of the United States for the Northern District of California, Division I, entered in said cause on the 2d day of May, 1914.

Dated May —, 1914.

D. FREIDENRICH,

Proctor for Libelee. [90]

Due service and receipt of a copy of the within Notice of Appeal is hereby admitted this 11th day of May, 1914.

F. R. WALL,

Proctor for Libelant.

[Endorsed]: Filed May 12, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [91]

In the District Court of the United States in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,354.

PEDER LARSEN,

Libelant,

vs.

NORTH ALASKA SALMON CO., a Corporation,
Libelee.

Assignment of Errors.

Now comes North Alaska Salmon Co., a corporation, libelee herein, and assigns as error in the decision, findings, proceedings and decree of the District Court the following:

1. The District Court erred in finding and de-

ciding that Peder Larsen, libelant, should recover for the cause of action set forth in his libel.

2. The District Court erred in finding and deciding that libelee, North Alaska Salmon Co., did not furnish libelant with proper medical attention and care.

3. The District Court erred in finding and deciding that libelee did not furnish libelant with proper medical attention and care, for the reason that the doctor regarded libelant's injury as trifling and libelant himself as a malingerer.

4. The District Court erred in finding and deciding that the doctor at all times seemed to regard libelant's injury [92] as trifling and libelant himself as a malingerer, and that therefore libelee failed to furnish libelant with proper medical attention and care.

5. The District Court erred in finding and deciding that libelee is liable to libelant upon the cause of action set forth in the libel, because of the fact that the doctor furnished by libelee to attend him did not properly treat him.

6. The District Court erred in awarding damages to libelant in the sum of Five Hundred and Six Dollars (\$506.00).

7. The District Court erred in awarding upon its decree to libelant interest upon the said sum of Five Hundred and Six Dollars (\$506.00), from the 21st day of December, 1912, to the date of the decree.

8. The District Court erred in not finding and deciding that libelee did not neglect to furnish libelant with proper care and attention.

9. The District Court erred in not finding and deciding that libelee did not by the terms of the Articles of Agreement referred to in the libel, agree that libelant should while serving libelee under said Articles receive medical and surgical attendance and medical and surgical necessities.

10. The District Court erred in awarding to libelant any damages whatsoever.

11. The District Court erred in not adjudging that the cause of action set up in the libel is not within the admiralty and maritime jurisdiction of the Court.

12. The District Court erred in not adjudging that the libel herein be dismissed with costs. [93]

Dated San Francisco, May 21st, 1914.

D. FREIDENRICH,

Proctor for Libelee and Appellant.

Received copy of the within notice, this 21st day of May, 1914.

F. R. WALL,

Proctor for Libelant.

[Endorsed]: Filed May 22, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [94]

*In the District Court of the United States in and for
the Northern District of California, First Divi-
sion.*

IN ADMIRALTY—No. 15,354.

PEDER LARSEN,

Libelant,

vs.

NORTH ALASKA SALMON CO., a Corporation,

Libelee.

Bond on Appeal Staying Execution.

KNOW ALL MEN BY THESE PRESENTS:

That we, the North Alaska Salmon Co., a Corporation, as principal, and Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto Peder Larsen, the libelant in the above-entitled cause, in the sum of Two Hundred and Fifty Dollars (\$250.00), and in the further sum of One Thousand Dollars (\$1,000.00), to be paid to said Peder Larsen, his heirs, executors, administrators or assigns, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our, and each of our heirs, executors, administrators and successors, jointly and severally, firmly by these presents. Sealed with our seals and dated the 18th day of May, in the year of our Lord One Thousand Nine Hundred and Fourteen.

WHEREAS, North Alaska Salmon Co., a corporation, libelee in the above-entitled cause, has appealed to the United States Circuit Court of Appeals, for the Ninth Circuit, from a decree of the District Court of the United States for the Northern District of California, bearing date the 2d day of May, 1914, in a

suit in [95] which said Peder Larsen is libellant against said North Alaska Salmon Co., a corporation, libelee, which decree orders the said libelee and its stipulators to pay libellant the sum of Five Hundred and Six Dollars (\$506.00), together with interest thereon from December 21, 1912, the date of the filing of the libel and costs.

AND WHEREAS said North Alaska Salmon Co., a corporation, desires, during the process of such appeal, to stay the execution of the said decree of the District Court:

NOW, THEREFORE, the condition of this obligation is such, that, if the above-named appellant, North Alaska Salmon Co., a corporation, shall prosecute said appeal with effect, and pay all costs which may be awarded against it as such appellant, if the appeal is not sustained, and shall abide by and perform whatever decree may be rendered by the United States Circuit Court of Appeals for the Ninth Circuit in this cause, or on the mandate of said Court by the Court below, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

NORTH ALASKA SALMON CO.,

J. GORMAN,

President.

FIDELITY AND DEPOSIT COMPANY OF
MARYLAND,

By GUY LeROY STEVICK,

Attorney in Fact.

PAUL N. NIPPERT, [Seal]

Agent.

[Seal]

Notary Public in and for the City and County of San
Francisco, State of California.

F. R. WALL.

WM. C. VAN FLEET.

Judge of Said Court.

Dated San Francisco, Cal., May 19th, 1914. [96]

[Endorsed]: Filed May 19, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [97]

*In the District Court of the United States, in and for
the Northern District of California, First Divi-
sion.*

IN ADMIRALTY—No. 15,354.

PEDER LARSEN.

Libelant,

VS.

NORTH ALASKA SALMON CO., a Corporation,
Libelee.

Stipulation as to Original Exhibit.

IT IS STIPULATED AND AGREED by and between the parties to the above-entitled action that the agreement between libelant and libelee, under which he entered into the employment of libelee, which agreement was introduced in evidence and is marked Libelant's Exhibit 1, may be transmitted in

its original form with the Transcript on Appeal, herein, to the United States Circuit Court of Appeals for the Ninth Circuit, and used on the appeal by either side.

Dated June 18, 1914.

F. R. WALL,
Attorney for Libelant.
D. FREIDENRICH,
Attorney for Libelee.

So ordered.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Jun. 19, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [98]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

No. 15,354.

PEDER LARSEN,

Libelant,

vs.

NORTH ALASKA SALMON COMPANY, a Corporation.

Libelee.

**Stipulation and Order Extending Time (to July 11,
1914) to File Apostles on Appeal.**

IT IS HEREBY STIPULATED AND AGREED
that an order of Court may be made extending the
time for the preparation of the apostles on appeal

in the above case to and including the 11th day of July, 1914.

F. R. WALL,
Proctor for Libelant.
D. FREIDENRICH,
Proctor for Libelee.

Dated June 11th, 1914.

So ordered.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Jun. 11, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [99]

**[Certificate of Clerk U. S. District Court to
Transcript of Record.]**

I, W. B. Maling, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and hereunto annexed 99 pages, numbered from 1 to 99, inclusive, with the accompanying exhibit, transmitted under separate cover, contain a full, true and correct transcript of certain records and proceedings as the same now remain on file and of record in the Clerk's Office of said District Court, in the cause entitled *Peder Larsen vs. North Alaska Salmon Company*, a Corporation, and numbered 15,354; and which said Transcript is made up pursuant to and in accordance with "Praeceptum for Apostles on Appeal" (copy of which is embodied in this transcript) and Rule 4 of "Rules in Admiralty" of the United States Circuit Court of Appeals for the Ninth Circuit, as well as the instructions of D. Freidenrich,

Esquire, proctor for respondent and appellant herein.

I further certify that the cost of preparing and certifying the foregoing Apostles on Appeal is the sum of Fifty-four Dollars and Sixty Cents (\$54.60), and that the same has been paid to me by proctor for appellant herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 8th day of July, A. D. 1914.

[Seal]

W. B. MALING,

Clerk.

By Lyle S. Morris,

Deputy Clerk. [100]

[Endorsed]: No. 2445. United States Circuit Court of Appeals for the Ninth Circuit. North Alaska Salmon Company, a Corporation, Appellant, vs. Peder Larsen, Appellee. Apostles. Upon Appeal from the United States District Court for the Northern District of California, First Division.

Received and filed July 10, 1914.

FRANK D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,

Deputy Clerk.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NORTH ALASKA SALMON COMPANY

(a corporation),

Appellant,

vs.

PEDER LARSEN,

Appellee.

BRIEF FOR APPELLANT.

Appeal from Decree in Admiralty Awarding Appellee (Libelant)
Damages Against Appellant North Alaska Salmon Company
in the Sum of \$506 With Interest for Breach of
Contract of Good Treatment.

D. FREIDENRICH,
Proctor for Appellant.

Filed this.....day of October, 1914.

Filed

FRANK D. MONCKTON, Clerk.

By.....OCT 24 1914.....Deputy Clerk.

F. D. Monckton,

No. 2445

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NORTH ALASKA SALMON COMPANY

(a corporation),

VS.

PEDER LARSEN,

Appellant,

Appellee.

BRIEF FOR APPELLANT.

Appeal from Decree in Admiralty Awarding Appellee (Libelant)
Damages Against Appellant North Alaska Salmon Company
in the Sum of \$506 With Interest for Breach of
Contract of Good Treatment.

Statement.

Libelant shipped on the company's vessel "Olympia" under Articles of Agreement, by the terms whereof he was to enter into the employment of the company in the capacity of seaman, fisherman, and trapman, also to work on boats, lighters, steamers and in any other capacity as directed by the company's superintendent during the salmon

fishing season of 1912, in Behring Sea district, Alaska.

While in that employment, on the 12th of July, 1912, he sustained an injury to his knee. He was at work at the time on a lighter which was alongside the company's dock on Brown River at Locanock; the work he was doing was throwing fish into a bucket to be hoisted up to the wharf. As the bucket started, it swung towards him; he made a quick movement and twisted his knee. He was not hit by the bucket.

The breach of good treatment according to the libel, consisted, (1) in the failure of the company to furnish him with proper medical care and attention, and (2) compelling him, after the injury, to work on the "Olympic".

It is only in these two particulars, that the company is alleged to have failed to furnish him good treatment. As to everything else connected with his treatment, no complaint is made.

As to the first, it is averred that he did not and could not receive proper medical and surgical care and attention at Locanock and that the company should have sent him to Nakneck or to Koggiung or to Dutch Harbor, where, it is alleged, he could have received proper medical and surgical care and attention.

It is also averred, that on or about the 24th day of August, 1912, he requested the company's superintendent to send him to Nakneck, or to Koggiung,

for treatment, but that the superintendent failed and neglected to send him to either of those places.

The Evidence.

After the injury he was taken to the bunkhouse; he was given the choice of being taken to Hallerville, where the hospital was located, but he did not think it was necessary. Dr. Hassett was the company's physician, employed for the trip. He was at Hallerville, which was about 3 miles from Locanock, and was immediately sent for. He came down and attended libelant that evening. He painted his knee with iodine and gave him some liniment (Record, p. 35). He continued thereafter to treat him. His knee showed no sign of injury and Dr. Hassett could not see anything the matter with it. The patient was dissatisfied with the doctor's treatment. He struck the doctor in the face and licked him (Record, pp. 35, 56 and 57). As to the qualifications of the doctor, the superintendent of the company by whom he was employed looked up his reputation and got recommendations from many people. He had two state licenses; one of them a New York license (testimony of C. P. Hale, Record, p. 58).

As to whether or no libelant asked to be sent elsewhere for treatment, there is a conflict in the evidence. Libelant testified that he asked Mr. Hale to send him anywhere to a doctor, but he did not mention any particular place (Record, p. 37).

Mr. Hale testified that he had a talk with libelant after the latter had whipped the doctor. That he offered to send him to Koggiung and to let him have the launch. That he told the man who ran the launch to be ready to take him in the morning and he told libelant he could go any time he wanted to, and said to him that so long as our doctor could not satisfy him, he was perfectly willing that he should go and see the other doctor (Record, p. 56).

Mr. Hale is corroborated by Alex. Young, who testified that when libelant said he would like to see another doctor and that there was another doctor at Koggiung, Mr. Hale said to the bookkeeper, "All right, you get the launch and take this man to Koggiung to see the doctor" (Record, pp. 51 and 52). This was said in the presence of libelant (Record, p. 53).

Upon libelant's return to San Francisco, he consulted Dr. Long, who found that he had inflammation of the knee joint; that the sac under the knee-cap was badly distended with fluid. The doctor kept him in bed a month or six weeks, applied hot compresses and massaged the knee joint (Record, pp. 18 and 19).

As to the complaint that he was compelled to work on the "Olympic", libelant testified (Record, p. 39) that he went on board the "Olympic" about the 1st of August and mended sails. He was engaged in that work until the 23rd or 24th of August. He was not compelled to do any work on the ship coming down (Record, p. 41).

Captain Evans of the "Olympic" testified that libelant worked a little on the vessel while at Bristol Bay repairing sails. That he had no orders to go to work, but did so voluntarily.

The Court below found upon the evidence in favor of libelant, and awarded him damages in the sum of \$506, with interest from December 21, 1912, the date of filing the libel.

The errors relied on by appellant are:

(1) The Court erred in holding that the cause of action is within the admiralty and maritime jurisdiction of the Court;

(2) That libelee did not furnish libelant with proper care and attention;

(3) That libelant is entitled to recover damages for breach of contract of good treatment;

(4) That libelant is entitled to damages in the sum of \$506;

(5) That libelant is entitled to interest on the amount of damages awarded from the time of filing the libel.

I.

THE CAUSE OF ACTION IS NOT WITHIN THE ADMIRALTY JURISDICTION OF THE COURT.

Admiralty jurisdiction in case of contracts is limited to those purely maritime.

The Orleans v. Phoebus, 11 Pet. 175.

It has no jurisdiction over contracts for the hire of seamen, except in cases where the service is substantially performed upon the sea or upon waters within the ebb and flow of the tide.

The Thomas Jefferson, 10 Wheaton 428.

Maritime contracts are such as relate to commerce and navigation.

Edwards v. Elliott, 21 Wall. 532.

A contract for building a schooner is not a maritime contract.

“Shipbuilding”, says the Court, “as ordinarily conducted, is an employment on land.”

“No reason is perceived why a contract to build a ship any more than a contract for the materials of which a ship is composed, or for the instruments or appurtenances to manage or propel the ship should be regarded as maritime.”

Edwards v. Elliott, 21 Wall. 532.

Libelant was employed by libelee in its business of canning salmon. The employees, including libelant, were engaged at San Francisco, and carried on libelee’s vessel to its canneries in Alaska, and were brought back at the close of the fishing season. The services to be performed by the employees were that of seaman, fisherman, beachman, trapman and such other services as may be required by the company’s superintendent.

After the “Olympia” reached Bristol Bay, libelant was sent ashore. His services as seaman on the

“Olympia” on the up-trip had terminated. At the time of the injury, he was at work on a lighter fastened to the wharf at Locanock. The work he was doing was within the services required of him by his contract of employment. The contract for that work, we submit, is not a maritime contract. If he had sustained an injury through the company’s fault while in performance of that work, an action for damages could not have been maintained in a Court of Admiralty, any more than it could, if he had sustained such injuries while at work on shore. This action is for breach of contract of good treatment, and the breach, if it occurred at all, was upon land and not upon the high sea or upon waters within ebb and flow of the tide.

It is a settled rule of maritime law, that a seaman who becomes sick or is maimed *while in the service of the ship* without his own fault, is entitled to be cared for at the expense of the vessel.

The Osceola, 189 U. S. 158;

The Iroquois, 194 U. S. 240, affirming 55 C. C. A. 497.

The facts of this case, however, do not bring it within that rule of maritime law, because at the time of the injuries, libelant was not in the service of the ship nor in the performance of any work of a maritime nature.

II.

**THE FINDING THAT LIBEELEE DID NOT FURNISH LIBELANT
WITH PROPER CARE AND ATTENTION IS NOT SUSTAINED
BY THE EVIDENCE.**

The Court below, in its opinion, says (p. 91) :

“I am satisfied from the evidence herein that the libelee did not furnish libelant with proper medical attention and care, after his injuries, as the doctor at all times, seemed to regard libelant’s injuries as trifling, and libelant himself as a malingerer. It is evident, however, that the injury to libelant’s knee was a grave one, which, if properly treated, would not have resulted so seriously.”

The company is held answerable in damages for the failure of the doctor to properly treat libelant’s knee. It is the duty of a shipowner to provide proper medical treatment and attendance for seamen suffering injury in the service of the ship, but the question as to what constitutes a performance of these duties must be determined with reference to the facts of each particular case.

Krelly v. The Kenilworth, 144 Fed. 376.

Dr. Hassett had been employed by libelee for the trip. He was a regularly licensed physician, and came well recommended. There is no evidence in the record tending to show that he was incompetent. His failure to discover any injury to the knee of libelant does not of itself show incompetency. The utmost that can be required of the company is to exercise reasonable judgment in providing proper medical treatment and attendance, but for the mis-

take, if any, of the doctor, there is, we submit, no rule of law which will hold the company liable in damages. There is no evidence in the record tending to show that the company was negligent in employing Dr. Hassett as physician for the trip, and no such issue was tendered by the libel.

III.

THE COURT ERRED IN AWARDING LIBELANT DAMAGES FOR THE LOSS OF EARNINGS AFTER HIS DISCHARGE FROM THE VESSEL OR FOR HIS EXPENSES AFTER SUCH DISCHARGE.

The Court fixed the damages at \$506, made up as follows: \$86 for doctor's fees, \$15 for medicines, and \$405, the amount libelant could have earned during the period of 4½ months after his discharge from the vessel (pp. 91-92).

The obligation of the vessel to support and cure a seaman taken sick or receiving injuries in the service of the ship, does not extend beyond the termination of his contract and his return to the port of discharge.

The Tammerlane, 47 Fed. 822;

The J. F. Card, 43 Fed. 92.

Krelly v. The Kenilworth, decided by the United States Circuit Court of Appeals, Third Circuit, 144 Fed. 376, was an action for breach of contract of good treatment.

Discussing the question of damages recoverable in such action, the Court said:

“In the case of *Osceola*, 189 U. S. 175, it was held that the vessel and her owners are liable in case a seaman is wounded, in the service of a ship, to the extent of his maintenance and cure, and to his wages, at least as long as the voyage is continued, and the Court quotes the language of Mr. Justice Storey, in *Reed v. Canfield*, 1st Sumn. 202: ‘The seaman is to be cured at the expense of the ship, of the sickness or injury sustained in the ship’s service. *It must be sustained by the party while in the ship’s service, and he is not to receive any compensation or allowance for the effects of the injury*, but so far, and so far only, as expenses are incurred in the cure, whether they are of a medical or other nature, for diet, lodging, nursing or other assistance, they are a charge on and to be borne by the ship. The sickness or other injury may occasion a temporary or permanent disability, but that is not a ground for indemnity from the owners. They are liable only, for expenses necessarily incurred for the cure, and when the cure is completed, at least so far as the ordinary medical means extend, the owners are freed from all further liability. They are not, in any just sense, liable for consequential damages.’ ”

The damages awarded by the Court below included \$405 as and for the amount which libelant could have earned during the period of 4½ months after his discharge from the vessel. This item is clearly consequential damages for which we submit, the ship or the owners are not liable.

It is alleged in the libel that, by the terms of the Articles of Agreement, libelant, while serving libelee

thereunder, was to receive medical and surgical attendance and medical and surgical necessities free of charge (Record, p. 6). The Articles were introduced in evidence upon the trial marked "Libelant's Exhibit 1", and pursuant to stipulation between the parties hereto, the original has been transmitted to this Court with the transcript on appeal, and is on file herein. The Articles do not contain any agreement that libelee was to receive medical or surgical attendance. The action, therefore, is not based upon any express agreement to that effect, but is based upon the rule of maritime law.

It is respectfully submitted that the decree appealed from should be reversed and that libelee have judgment for its costs.

Dated, San Francisco,
October 19, 1914.

D. FREIDENRICH,
Proctor for Appellant.

No. 2445.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

NORTH ALASKA SALMON COMPANY (a Corporation),
Appellant,

vs.

PEDER LARSEN,

Appellee.

APPELLEE'S BRIEF.

F. R. WALL,
I. F. CHAPMAN,
Proctors for Appellee.

Filed this..... day of November, 1914.

FRANK D. MONCKTON, Clerk.

By..... Deputy Clerk.

THE JAMES W. GERRY COMPANY
SAN FRANCISCO

Filed

NOV 5 - 1914

F. D. Monckton,

Clerk.

No. 2445.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

NORTH ALASKA SALMON COM-
PANY (a corporation),

Appellant,

vs.

PEDER LARSEN,

Appellee.

APPELLEE'S BRIEF.

Supplemental Statement.

All of appellant's testimony was taken in open court. The libelant also testified before the court, but a great part of the testimony in his behalf was taken by depositions.

The record shows that libelant shipped as a seaman on the "Olympic" for a voyage from San Francisco to libelee's salmon cannery at Locanock, Alaska, and

return; that libelant and libelee entered into a written agreement by which libelant agreed to work for libelee in Alaskan waters during the salmon season of 1912 in the capacity of seaman, fisherman, beachman, trapman, and also to work on boats, *lighters* and steamers at and about libelant's cannery during that season (Ap. 6), in other words, there was the usual agreement of a seaman and fisherman going North fishing for the season, paid for the trip up and down, and by the catch or lay while there (See Articles and Ap. 31, 71, 72); that libelant, as one of the crew of the "Olympic," helped work her North; then worked on board of her on her sails until the latter part of June, when he began fishing; that he fished until the 10th of July, when he was taken out of his fishing boat and put to work in one of the libelee's lighters to help discharge the fish that she took from the fishing boats; this lighter and others were used in transporting fish up and down the river, to bring them to the wharf (Ap. 23, 71, 72); in the beginning of the season this lighter, to take on fish, went away down toward Naknek or they towed it up Brown's or Branch River (Ap. 24, 71) to discharge at the fish wharf; the fishing boats would discharge their fish on this barge or lighter, and she would then be towed up to the fish wharf and discharge her fish there (Ap. 24). On July 12th the libelant received his injuries, while at work on board of this lighter, loading fish from the lighter into a bucket to be thence discharged upon the

wharf. At that time, the lighter was lying afloat alongside of the fish wharf (Ap. 24). After the libelant was injured, he was sent to the libelee's bunkhouse, where his knee was painted with iodine by the doctor in libelee's employ; in this doctor's opinion, there was then not much the matter with libelant and libelant would be all right the next day (Ap. 26, 42, 73); this doctor came from Hallerville, three miles away, where the hospital was (Ap. 37); the doctor did not see the libelant again until July 15, when the doctor told the libelant there was nothing the matter with his knee, that the only thing the matter with him was that libelant would better get out and go to work; at this time the doctor told the beach boss in libelant's presence that Larsen was lazy and had better be put to work, at the same time saying he would see the superintendent and tell him to give Larsen lots of work (Ap. 26, 43, 74); after that the entente between the doctor and the libelant was, naturally, not cordial, and although Larsen remained on shore until August 1st, the doctor did not go near him; that on August 1st the beach boss sent Larsen on board the "Olympic," to work at mending sails, and Larsen worked at that on board of the "Olympic" from August 1st to August 23rd, when his leg got so bad he could walk on it with great difficulty, and he came ashore to see this doctor again (Ap. 27, 28); this doctor laughed at him, and again told him there was nothing the matter with his knee; that all that was the matter with him

was that he was lazy (Ap. 28, 43) ; this was too much for Larsen and, very justifiably, it seems to us, he struck or slapped the doctor in the face (Ap. 36, 43). Certainly from that time on Larsen needed another doctor. On that or the next day Larsen went to the superintendent, stated his case, and asked for another doctor. He got no other doctor, although he might have been sent to one of the many nearby places. He asked to be sent to Nushigak, Koggiung or Naknek or over to Dutch Harbor (Ap. 28). Of this meeting, Hale, the superintendent, testified: "I said (to Larsen), 'Our doctor claims you don't want him to treat you, and you won't let him treat you.' The doctor *complained from the first time* he went down there *that this man didn't want him to treat him*" (the testimony shows the man was eager to be treated) *"and I had to keep making the doctor go . . .* He (Larsen) complained of the doctor. The doctor *told me from the very first* that Larsen didn't want *him to treat him*" (Ap. 56, 57). There was no conversation in the libelant's presence between Hale and the bookkeeper about a launch, nor did the libelant tell the bookkeeper or any one else that he didn't want to be taken where he could receive attention; on the contrary, he asked for a launch, and was told there was none to spare (Ap. 63, 64). And Hale himself says that he made no inquiries why Larsen wasn't sent; that he didn't ask the bookkeeper if Larsen had gone; that he didn't ask the bookkeeper why Larsen

did not go; that he didn't ask Larsen why he did not go (Ap. 61). And the large fact is also testified to by Hale that the only time he had any conversation with Larsen was about August 24th (Ap. 58), although Hale knew *from the first* that the doctor did not want to treat Larsen and that the doctor had told Hale that Larsen did not want the doctor to treat him. And with full knowledge of the situation, Hale never caused anything to be done for Larsen and never saw him after this conversation.

ARGUMENT.

Before proceeding to take up the points argued in appellant's brief, we will notice briefly the one as to interest, numbered "(5)" in its brief, on page 5. We do this simply out of an abundance of caution, for we are satisfied that, as the point is not argued or otherwise noticed in the brief or raised in the record, this court will not consider it.

If the appellant had considered itself injured in this respect, it could have brought the matter to the attention of the trial court at any time before perfecting its appeal. This was not done, and the record shows that the point was not in any way urged or considered in the court below.

"The record does not show that any such objections were made in the court below at any time. The court never was called upon to decide this question. . . ."

"In the present case it was not presented in any form or manner whatsoever in the court below, and cannot be considered by this court. *Wasatch M. Co. v. Crescent M. Co.*, 140 U. S., 293, 298, 13 Sup. Ct., 600, 37 L. Ed., 454." *Paauhau, etc. Co. v. Palapala*, 127 Fed., 922. To the same effect *Lloyd v. Preston*, 146 U. S., 630.

Besides, it is usual, for breach of contract, to allow interest in admiralty from the date of the breach or from the filing of the libel. There is a similar rule in equity. *Nashua & Lowell Ry. v. Boston & Lowell Ry.*, 61 Fed., 238.

"The allowance of interest in admiralty cases is discretionary, and not reviewable in this court except in a very clear case. *The Scotland*, 118 U. S., 507, 518, sub. nom. *Dyer v. National Steam. Nav. Co.*, 30 L. ed., 153, 155, 6 Sup. Ct. Rep., 1174." *The Albert Dumois*, 177 U. S., 255, 44 L. ed., 760.

I.

The Cause is Within the Admiralty Jurisdiction.

Appellant's argument upon this point proceeds upon several erroneous assumptions.

It seems to be confused over the jurisdiction of the admiralty in case of torts and its jurisdiction over contracts maritime in their nature. This is apparent by its citation (Br. 6) of the *Thos. Jefferson*, 10 Wheat., 428, which was a libel for tort, and decided nothing whatsoever in regard to contracts for the hire of seamen, which contracts, of course, have from time im-

memorial been within the jurisdiction of the admiralty. The Jefferson case did decide that, *in torts*, the admiralty had no jurisdiction if the tort occurred beyond the ebb and flow of the tide. But even upon that point, the Jefferson *was overruled* in express language by the *Genessee Chief*, 12 How., 459 (see also cases collected in Rose's Notes to 12 How. at p. 115 of Notes), and the rule ever since the *Genessee Chief* has been that in torts the jurisdiction extends "to all navigable water of the United States, whether landlocked or open, salt or fresh, *tide or no tide*." *Ins. Co. v. Dunham*, 11 Wall., 1.

But the case at bar is not in tort. It is a libel for the breach of the implied contract to furnish a seaman and fisherman with proper treatment after he was injured while at work on board of a lighter lying afloat in the water of Branch or Brown River.

The contract breached being a maritime contract, it does not matter where the breach occurred. In such a case, "the true criterion (as to jurisdiction) is the "nature and subject matter of the contract, as whether "it was a maritime contract, having reference to maritime service or maritime transactions." *Ins. Co. v. Dunham*, 11 Wall., 1.

The extension of the jurisdiction of the admiralty to its present position, both as to torts and on contract, is well shown in the cases gathered in note 9 to sec. 8, Ben. Ad., 4th Ed. And the whole subject as to con-

tracts is well summed up, in the same work, at the end of sec. 181, thus:

"The jurisdiction can depend upon nothing, in matter of contract, but the subject matter, the nature and character of the controversy (*The Resolute*, 168 U. S., 437). If that be connected with ships and shipping, commerce and navigation, the admiralty has jurisdiction, otherwise not . . . 'Toutes affaires relatives à la navigation et aux navigateurs appartient au droit maritime' (See 3 *Pardessus Lois Mar.*, 451, *The Steamship Jefferson*, 215 U. S., 130)."

The law and some of the authorities applying particularly to the case at bar upon this point are:

Sec. 4612, U. S. R. S. "In the construction of this title (53), every person having the command of any vessel belonging to any citizen of the U. S. shall be deemed to be the 'master' thereof; and every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same shall be deemed and taken to be a 'seaman';"

Reed et al. v. Canfield, Fed. Cas. No. 11,641, was a case of injury to a member of a whaling ship while he was voluntarily away from the vessel on boat duty. While in the boat, he received his injuries. Judge Story there said (p. 428):

"Indeed, the 18th article of the Laws of Wisbuy expressly declares, 'that a mariner, being ashore in the master's or the ship's service, if he should happen to be wounded, he shall be maintained and

cured at the charge of the ship.' The commercial law of France furnishes an equally liberal rule, both in its ancient and modern codes. See 1 *Valin, Comm. lib.* 3, p. 72, tit. 4, art. 11; *Code Com. arts.*, 262, 263; 2 *Pet. Adm. Append.*, p. 33, art. 11. *Cleirac, Us et Coutumes de la Mer.*, p. 31; *Jugemens d'Oleron*, p. 18, arts. 6, 7."

Fishermen on mackerel voyages, in licensed and enrolled vessels, come within the general rule relating to hired seamen so as to be entitled to be cured at the ship's expense. *Knight v. Parsons*, Fed. Cas. No. 7886.

"They were hired fishermen, whose wages were dependent on the success of the fishing in which they were engaged. Fishermen are seamen, having uses and customs peculiar to their business, but are at the same time, except as modified by their peculiar contracts, express or implied, protected by the law as other seamen are." *The Carrier Dove*, 97 Fed., 112.

Domenico v. Alaska Packers Assn. was a case arising under an agreement practically identical with the one at bar. In that case, Judge De Haven said (112 Fed., 556):

"1. It will be noticed that the principal subject of the contract upon the part of the libelants was for the rendition of services as fishermen at Pyramid Harbor, and included work in the cannery on shore, in preserving the fish caught by them, and also the labor of placing the fish on board the 'Two Brothers' for transportation to San Francisco. The contract is, however, maritime in its nature. The fact that, while engaged in fishing at Pyramid Harbor, the libelants slept on shore,

and mended their nets, and cared for the fish on shore, and that this was contemplated by the contract, does not make it any the less a maritime contract which a court of admiralty has jurisdiction to enforce. *The Minna* (D. C.), 11 Fed., 759."

The case of *Whitney v. Olsen*, 108 Fed., 292, decided by this court, was the case of a seaman and fisherman on a codfishing voyage on a lay.

A barge without sails or rudder, used for transporting brick, on which men are employed in loading, carrying and delivering brick is subject to a maritime lien for services on board of her. *The Walsh Bros.*, 36 F., 607.

A bath house built on boats and designed for transportation is within the admiralty jurisdiction. *Tebo v. City of New York*, 61 F., 692.

Admiralty jurisdiction extends to lighters employed in carrying lumber out to vessels lying in deep water. *The Gen'l. Cass.*, Fed. Cas. No. 5,307.

To the same effect are *The Old Natchez*, 9 Fed., 476; *Endner v. Greco*, 3 Fed., 411; *One Covered Scow*, 30 Fed., 269.

In the case at bar the libelant was both in the service of the libelant as a seaman and fisherman, under his agreement, and was injured while performing work of a maritime nature upon a floating lighter, used by libelee for transporting fish from the fishing boats to the wharf. So that he was there in double trust, under the aegis of the admiralty.

II.

The Testimony is Ample to Sustain the Finding that Libelee Did not Furnish Libelant with Proper Care and Attention.

There need only be said under this head that the court heard the libelant and the witnesses for the libelee testify, and chose to believe the libelant. What we have set out in the supplemental statement shows that the court could have done nothing else. But appellant itself says (Br. 3) "there is a conflict in the evidence" on the material point. Under the well-settled rule here, this court, of course, does not consider changing the findings of the trial court, unless the same are clearly unsupported by the evidence.

But here, too, counsel for appellant begs the real question, which is not, Was the company negligent in employing Dr. Hassett for the trip? But is, Did the company at any time during the season and before the end of the voyage fail to furnish libelant with proper care and attention, after his injuries? We submit, the only conclusion that could be reached by the trial court, from the testimony, was that the libelee did not provide or exercise reasonable judgment to provide proper medical treatment and attendance after Larsen was injured. It is an implied part of every contract of a seaman that he shall at all times during his service receive such proper surgical and medical care and attention as the circumstances permit to be given. The

libelee knew, through its superintendent, "that the doctor complained from the first time he went down there that this man did not want him to treat him"; that he (the superintendent) had to keep making the doctor go. Yet with this knowledge and after the man himself had grown steadily worse and had himself complained to the superintendent, the libelee failed to see that he received proper treatment, although the same was easily accessible; that after this the libelant continued to grow worse.

III.

The Award Made Below Was Strictly in Accordance With the Rule Laid Down by This Court in the Case of *The Troop*, 128 Fed., 858.

There, this court said, after fully considering the case of the *Osceola*:

"It has been uniformly held for nearly a quarter of a century that a seaman injured while in the service of his ship is entitled to proper care and medical attention at the expense of the ship, and that, if this be neglected, the ship may be held in consequential damages." *The Troop*, 128 Fed., 858, citing cases.

The amount awarded Larsen was nothing more than the amount deemed by the court the proper measure of his damages. In fact the court below said, what was not absolutely necessary for the decision of the case (Ap. 92):

"If he had received proper treatment at the time of his injury and up to the end of the voyage home, nothing would be allowed him for expenses or losses thereafter."

In the Iroquois the award was \$3000 and in the Troop \$4000. Each award was sustained by this court.

It is, therefore, not necessary to consider the cases cited by appellant under this subdivision. However, it may be said that it is not the law that the obligation of the vessel or her owners does not extend beyond the end of the voyage. In the case of *Barwa v. "Svea,"* No. 15,032, Northern District of California, Judge Bean said:

"The later and more humane rule is that the liability of the ship may extend beyond the voyage, that is, for a reasonable time, if necessary to effect the cure, so far as the same can be done with ordinary care and attention. . . . So long as the injured seaman requires medical care and attentions, nursing and the like, on account of his injuries, the expenses thereof are to be borne by the ship."

"In the nature of things the end of the voyage does not end the obligation, if there was not sufficient time and facilities for the vessel to have thus done its duty. Its unfulfilled obligation may continue after the voyage ends." *The Mars*, 149 Fed., 731, C. C. A. 3rd Cir.

"Under the evidence, I think an allowance of \$500 and interest should be made. The claimant was in the hospital for three months, where he was maintained and cared for free of charge. But he

could not work for about nine months longer, and he has spent money for medicine, crutches and an artificial foot (once renewed), and still owes for boarding during the time he was under disability. A decree may therefore be entered for \$500, with interest from November 21, 1911, (this seems clearly a typographical error for 1910, *the date of the accident*), and costs." *Doughtery v. Thompson Lockhart Co.*, 211 Fed., 227.

The case here is this:

For the breach of a maritime contract, the court below, on most convincing testimony, determined that the proper measure of libelant's damages was \$506, with interest from the date of the filing of the libel.

We respectfully submit that the decree should be affirmed.

F. R. WALL,
I. F. CHAPMAN,
Proctors for Appellee.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

AUGUST BAY,

Plaintiff in Error,

vs.

MERRILL & RING LOGGING CO., a cor-
poration,

Defendant in Error.

No. 2417

Upon Writ of Error to the United States District Court
for the Western District of Washington,
Northern Division.

BRIEF OF DEFENDANT IN ERROR

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IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

AUGUST BAY,

Plaintiff in Error,

vs.

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poration,

Defendant in Error.

No.

Upon Writ of Error to the United States District Court
for the Western District of Washington,
Northern Division.

BRIEF OF DEFENDANT IN ERROR

STATEMENT.

On the 21st day of October, 1912, August Bay was injured, while in the employ of the Merrill & Ring Logging Company, and engaged in loading logs on a flatcar in the woods in Snohomish County, Washington, where they had been cut preparatory to transporting them upon that car to the nearby waters of Puget Sound. Thereafter he instituted this action, alleging that his injuries were due to the negligence of the defendant in error, seeking to recover under the provisions of the Federal employers' liability

act (35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322, printed in full in 223 U. S. p. 6, 56 L. ed. 329, 38 L. R. A. [N. S.] 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875).

At the conclusion of the plaintiff's evidence motion was made for a directed verdict and the court entered a judgment on the grounds that it affirmatively appeared from the plaintiff's evidence that the Merrill & Ring Logging Company was not a common carrier and that neither the plaintiff nor the defendant was engaged in interstate commerce at the time of the happening of the accident. The evidence discloses the following facts:

The Merrill & Ring Logging Company, owning extensive tracts of timber in Snohomish County, Washington, is a corporation resident in that state. It is engaged solely in logging its own lands. As a part of its logging operations and as a necessary adjunct thereto, it has built and operates a standard gauge logging railroad. This road extends through its own timber and connects with the company's boom ground in Puget Sound. The operation of this railroad is a part of the logging business. The road is connected by switches with the Great Northern and Interurban roads, but those connections are used only for the purpose of bringing necessary supplies to the logging camps of the company. At no time has any shipment of logs or timber of any kind been sent over these switches. There was some evidence that a number of years prior to the happening of this accident a shipment of steel rails had gone over the

logging road for the Interurban which at the time was being constructed and which had no connections at either its Seattle or Everett terminals. The only charge made for that service was the actual expense of operating the locomotive, and the Interurban Company assumed all liability for damages on account of accidents occurring in this transportation. The Merrill & Ring Logging Company does not manufacture any of the logs which it carries down to the Sound, nor are any of them under contract by that company to be sold for foreign shipment or for any shipment at all. The logs are sold from the boom into which they are dumped from the cars. There they are rafted by the purchasers and towed away by tugs. The purchasers pay for them and take possession of them in the boom. Any loss occurring while they are being rafted away is that of the purchaser. Many of the logs are sold to nearby mills upon the Sound which are engaged in the manufacture of lumber, and this, as a finished product, is ultimately disposed of, in a large part, outside of the State of Washington.

The Merrill & Ring Company at times prior to the happening of this accident, had taken out some poles which were sold and delivered at its boom to a purchaser who resided and did business in Everett, Washington, and who, in turn, resold the poles for shipment to California, but the evidence shows that plaintiff was not engaged in loading any of these poles upon the train at the time of the happening of this accident.

ARGUMENT.

I.

A right to recover under the terms of this statute arises only when a common carrier by railroad is engaged in interstate commerce, and when the employe is employed by the carrier in such commerce. *Pederson v. Delaware, Lackawanna & Western Railroad Company*, 229 U. S. 146.

II.

The Merrill & Ring Company Is Not Engaged in Interstate Commerce.

The facts revealed by the record in this cause place upon the operations of the Merrill & Ring Company the impress of a strictly intrastate commerce. Their activities commenced and ended with the preparation of the product of the forest for a strictly local market. Their operations contemplated nothing more than the transportation of these logs from their own forest over their own land to their own boom. There that transportation ended so far as the defendant was concerned; there they were sold and the logging company's interest in them ceased. It was not a participant in any commerce of which they might subsequently become the subject matter. Whether they were afterwards started upon an interstate journey or whether they continued in intrastate commerce was a question with which the producing company had no concern. The logs were not delivered by them to a carrier whose service was the initial step in a foreign ship-

ment. The boom ground was the end of their journey—there they might lie for a day or a month; there the ownership of the purchasers attached and the interest of the Logging Company ceased. They were purchased by nearby mills in which they were to be subjected to processes of manufacture, and where the finished product might be sold as the subject of either interstate or intrastate commerce. Is not this the identical situation described in *Coe v. Errol*, 116 U. S. 517, 525?

“When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an entrepot for that particular region, whether on a river or line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the State to the State of their destination, or have started on their ultimate passage to that State. Until then it is reasonable to regard them as not only within the State of their origin, but as a part of the general mass of property of that State, subject to its jurisdiction, and liable to taxation there.”

And at page 528:

“The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence is no part of that journey. That is all preliminary work, performed for the purpose of putting the property

in a state of preparation and readiness for transportation. Until actually launched on its way to another State, or committed to a common carrier for transportation to such State, its destination is not fixed and certain. It may be sold or otherwise disposed of within the State, and never put in course of transportation out of the State. Carrying it from the farm, or the forest, to the depot, is only an interior movement of the property, entirely within the State, for the purpose, it is true, but only for the purpose, of putting it into a course of exportation; it is no part of the exportation itself. Until shipped or started on its final journey out of the State its exportation is a matter altogether *in fieri*, and not at all a fixed and certain thing."

Under this pronouncement of the Supreme Court it must be said that the operations of the Merrill & Ring Company went no further than to gather these logs from the forest into a logging market, preparatory, if indeed it can even be said that so much was contemplated, to making them ultimately subjects of interstate commerce. Under the numerous decisions of the Supreme Court of the United States, the Merrill & Ring Company was engaged solely in a domestic commerce:

Gulf, Colorado & Santa Fe Ry. Co. v. Texas,
204 U. S. 403.

Bacon v. Illinois, 227 U. S. 504.

C. M. & St. P. Ry. Co. v. Iowa, U. S. Sup. Ct. Adv. Sheets, Vol. 34, No. 12, May 15, 1914, p. 592.

The Daniel Ball, 10 Wall. 557.

Co. v. Errol, 116 U. S. 517.

Diamond Match Co. v. Ontonagon, 188 U. S. 82.

Kelley v. Rhoads, 188 U. S. 1.

General Oil Co. v. Crain, 209 U. S. 211.

Counsel bases his contention to the contrary upon the cases of the *Railroad Commission of Ohio v. Worthington*, 225 U. S. 101; *United States v. Union Stock Yard & T. Co.*, 226 U. S. 286; *So. Pac. Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498; *Texas & New Orleans R. R. Company v. Sabine Tram Co.*, 227 U. S. 111.

Those cases, when carefully analyzed, will be found, however, to contain nothing which in any measure limits or modifies the rule announced in *Coe v. Errol*, 116 U. S. 517. They are, in fact, authorities which substantiate the contention of the defendant in this cause, and by their application determine the character of the commerce carried on by the Merrill & Ring Logging Company as domestic and not foreign commerce. They but state and apply the converse of the proposition contained in *Gulf, Colorado & Santa Fe Ry. Co. v. Texas* (*supra*). Taken with that decision they enunciate only the rule that it is the service actually contemplated and the intention of the shipper, and not the mere evidentiary incidents, such as bills of lading, which must

ultimately determine the character of any particular movement in commerce. If we apply this rule to the facts of the present case, we find that the service contemplated by the Merrill & Ring Company was the transportation of these logs from one point within the State to another point within the State. It was the intention of the Merrill & Ring Company to deal with them only while they remained in the State; to terminate their interest in them before they departed from the boom; participation in the commerce of which these logs were the subject matter was to cease simultaneously with the attaching of the interest of any purchaser who might ultimately make them subjects of interstate commerce. The decision in *Texas & New Orleans R. R. Co. v. Sabine Tram Co.*, 227 U. S. 111, was rested largely upon the fact that there was no market for lumber at the point within the State to which the product had been shipped under a local bill of lading, while it appeared that the real market contemplated by the parties when the shipment was started was a foreign one. Here was a market at the boom ground and it was the only market wherein this defendant dealt with these logs as subjects of commerce. In the *Sabine Tram Company* case it was said that the parties never in fact intended that the shipment should end within the State. In the instant case there was never any intention to transport these logs beyond the point of delivery. It was the intention of the company to there part with all interest in them and deal with them no further than to make delivery to any purchaser who might buy them,

whether such purchaser proposed to ultimately start them upon a journey to another State or to deal with them in a strictly domestic commerce. If, therefore, it is the logic of the line of decisions cited by counsel as stated in *United States v. Union Stock Yard & T. Co.*, 226 U. S. 286, that the character of the service rendered determines the interstate or intrastate character of the commerce, these are authorities which will exempt the defendant in this cause from liability, for the essential character of the service here rendered was that of a logging road operated as a plant facility in a logging business contemplating transportation only from the forest to the boom ground.

Duluth-Superior Milling Co. v. Northern Pac. Ry. Co., 140 N. W. 1105.

Gulf, Colorado & Santa Fe Ry. Co. v. Texas, 204 U. S. 403.

III.

Defendant Is Not a Common Carrier.

The act by its terms is applicable only to common carriers by railroad. We submit that there is absolutely no evidence in the record upon which there could be rested a finding that this defendant was, at the time of the accident, engaged as such common carrier, within the meaning of the Federal employers' liability act. That enactment operates in derogation of the common law and while the courts will so construe it as to reasonably effectuate its purpose, it will not be extended by construction to cover any cases other than those clearly within its terms. Surely the trial court was right in finding that

this road, a mere adjunct to the logging business of the defendant, was not engaged as a common carrier. The road has never been used for any purpose other than that of transporting the logs of the Merrill & Ring Logging Company from its own forest to its own boom ground; no demand has ever been made upon it for services; it has never held itself out to the public as being so engaged; it has never, so far as this evidence discloses, exercised any of the powers or enjoyed any of the privileges of a common carrier road.

“A common or public carrier is one who, by virtue of his business or calling, undertakes, for compensation, to transport personal property from one place to another, either by land or water, and deliver the same, for all such as may choose to employ him.” *Moore on Carriers*, p. 18, § 1, Chapter II.

It has been repeatedly held that a logging road, operated by a milling or logging company as a mere adjunct to a mill or logging camp, is not a common carrier.

Moore on Carriers, § 35, p. 72.

Wade v. Lutchter & Moore Cypress Lumber Co., 74 Fed. 517.

Eastern & Western Lumber Co. v. Rayley, 157 Fed. 532.

E. E. Taenzer & Co. v. Chicago, R. I. & P. R. Co., 170 Fed. 240.

Ellington v. Beaver Dam Lumber Co., 19 S. E. 21.

Texas & P. Ry. Co. v. Henson et al., 121 S. W. 1127.

Straight Creek Coal Min. Co. v. Straight Creek Coal & Coke Co., 122 S. W. 842.

The only possible basis upon which counsel may rest his contention upon this phase of the case is the fact that among the powers enumerated in the charter of the Merrill & Ring Logging Company is the power to construct and maintain a common carrier road, and in the consummation of that purpose to exercise the power of eminent domain. But the company as a private corporation is also given the power to own and operate a logging railroad as an adjunct to its logging business. Under which of these powers is the company acting? Clearly it is acting by virtue of those powers which are granted to it as a private corporation. It does not appear that the Merrill & Ring Company has ever exercised the power of eminent domain; it has never held itself out to the public as a common carrier; no demand has ever been made upon it for services of that nature. It has never, in fact, acted as such. It has served one purpose only—that of a logging railroad, maintained as an incidental part of the business of logging extensive tracts of timber.

This Court is not called upon to determine the relation of the company to a person offering himself as a shipper or a passenger, nor the question of whether condemnation proceedings could be successfully re-

sisted on the grounds that the use to which the railroad is put is not a public one. The Supreme Court of the United States and the Federal appellate courts have frequently held that corporations standing in the relation of common carriers to the public as passengers or shippers do not occupy such relation when not in the exercise of their functions as a common carrier. They may by contract exempt themselves from liability due to negligence when acting otherwise than as common carriers. Surely in this instance the plaintiff was employed as a logger in the logging business of a private corporation, and the case falls within the rule of *Santa Fe Railway v. Grant Bros.*, 228 U. S. 177, wherein it was held that a transcontinental railroad, in dealing with the transportation of men and material in connection with the construction and improvement of its own road, was acting in its capacity as a private corporation and not as a common carrier. In the case of *Wade v. Litcher & Moore Cypress Lumber Co.*, 74 Fed. 517, which has been approved and quoted by this Court, it was held that a constitutional provision similar to the one contained in our constitution, making all railroads within the State common carriers, did not make a company owning a logging railroad liable as a common carrier in a personal injury action.

The actual status of a railroad such as this one is fixed by the real and actual scope of its operations, and the fact that it has reserved and unexercised powers of a common carrier will not make it such

when it is acting outside the scope of the duty of a common carrier.

Santa Fe Ry. Co. v. Grant Bros., 228 U. S. 177.

Shade v. Northern Pacific Ry. Co., 206 Fed. 353.

Wade v. Lutcher & Moore Cypress Lumber Co., 74 Fed. 517.

The only evidence in this case is that adduced by the plaintiff and from that evidence it affirmatively appears that the Merrill & Ring Logging Company is not a common carrier by railroad; that it was not engaged in interstate commerce at the time of the happening of this accident and was not at that time employing this plaintiff in such commerce.

The judgment of the District Court should be affirmed.

Respectfully submitted,

HUGHES, McMICKEN, DOVELL & RAMSEY,
Attorneys for Defendant in Error.

No. 2448

United States
Circuit Court of Appeals

For the Ninth Circuit.

MARY M. SMITH, as Executrix of the Will of
JOHN M. SMITH, Deceased,
Appellant,

VS.

WILLIAM SMITH,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court
for the District of Montana.

Filed

AUG 12 1914

F. D. Monckton,
Clerk.

No. 2448

United States
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MARY M. SMITH, as Executrix of the Will of
JOHN M. SMITH, Deceased,
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vs.

WILLIAM SMITH,
Appellee.

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Upon Appeal from the United States District Court
for the District of Montana.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the *text* is indicated by printing in *italic* the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys of Record.

Messrs. WALSH, NOLAN & SCALLON, Helena,
Montana.

Solicitors for Complainant and Appellee.

Messrs. H. G. & S. H. McINTIRE and R. LEE
WORD, Esq., Helena, Montana,

Solicitors for Defendant and Appellant.

[1*]

*In the District Court of the United States in and for
the District of Montana.*

No. 5—IN EQUITY.

WILLIAM SMITH,

Complainant,

vs.

MARY M. SMITH, as Executrix of the Will of
JOHN M. SMITH, Deceased,

Defendant.

BE IT REMEMBERED that on May 17, 1913,
the complainant filed his bill of complaint herein, in
the words and figures following, to wit: [2]

*In the District Court of the United States in and for
the District of Montana.*

WILLIAM SMITH,

Complainant,

vs.

MARY M. SMITH, as Executrix of the Will of
JOHN M. SMITH, Deceased,

Defendant.

*Page number appearing at foot of page of original certified Record.

Bill of Complaint.

Now comes the above-named complainant, William Smith, and complaining of the above-named defendant, alleges and shows to the Court the following, to wit:

I.

That the complainant is a citizen and resident of the State of California.

That the defendant is a citizen and resident of the State of Montana.

II.

That the ground of jurisdiction, in this case, is diversity citizenship between the parties hereto.

III.

That the complainant is one of the children of the late William A. Smith, who departed this life in the said County of Meagher on the 13th day of February, 1897; that said William A. Smith left three children, to wit, the complainant and two sisters of the complainant, and that these were the only heirs of William A. Smith; that on the 28th day of March, 1899, the above-named John M. Smith, deceased, was duly appointed guardian of this complainant and of his two sisters by the District Court of the (then) Ninth Judicial District of the State of Montana, in [3] and for the County of Meagher aforesaid; that thereafter, to wit, on the 25th day of May, 1899, the said John M. Smith filed the bond required by law and the oath of office required by law in such cases and duly qualified as such guardian, and thereupon he became and thereafter continued, until the major-

ity of this complainant the duly appointed, qualified and acting guardian of said complainant; that on the 14th day of June, 1899, the said John M. Smith received from N. B. Smith, who had been executor of the estate of William A. Smith, deceased, the sum of eighty-two thousand one hundred and seventy-four and 20/100 dollars (\$82,174.20), and that he received this sum as the guardian of this complainant and of his two sisters; that one-third of the said sum was the property of this complainant; that on said 14th day of June, 1899, the said John M. Smith appropriated and converted all of the said money to his own use and then and there paid the same out to a creditor of himself to whom he owed a debt in his personal capacity, and that thereafter he did not invest the said money or any part thereof or seek an investment for the same, but, on the contrary, the same remained and continued to be appropriated and converted to his own use during the minority of said complainant, except in so far as payments on account *there* were made for the use or on account of this complainant during his minority; that said John M. Smith wilfully failed and neglected to invest any of the moneys received by him as guardian of this complainant, and that the interest which he allowed as hereinafter set forth, as well as the principal, was by him retained and converted to his own use and appropriated by him and kept appropriated by him to his own uses all during the minority of this complainant, except in so far as payments were made on the account of this complainant, as will be more fully herein set forth; that in addition to the aforesaid

sum, the said John M. Smith also received, in his capacity as guardian of this complainant, various sums received as dividends from the First National Bank of White Sulphur Springs [4] upon stock in said bank owned by this complainant, and that the said John M. Smith made no investment of the said sums and wilfully failed and neglected to invest the same, and that he mingled them with his own funds and used them as his own as this complainant avers on information and belief; that the said John M. Smith did not charge himself, as guardian, with any interest or allow or ever pay any interest at all to this complainant for the use of said moneys for the period from said 14th day of June, 1899, to the 11th day of December, 1900; that on the said 11th day of December, 1900, the said John M. Smith procured from the said District Court, or the Judge thereof, an alleged order purporting to give authority to the said John M. Smith to borrow from himself as guardian the sum of eighty-two thousand dollars (\$82,000.00) at the rate of three per cent per annum; that thereafter, in rendering his accounts as guardian, the said John M. Smith charged himself with interest on what he claimed to be the balance thereof, but on no other sum at the rate of three per cent per annum.

IV.

Complainant alleges that he is advised and believes and he charges that the said order was void and made without authority of law, and this complainant further avers and charges, on his information and belief, that the said order was fraudulently obtained and is

void and was a fraud upon said Court and upon this complainant in this, to wit, that the said John M. Smith had already appropriated the said moneys to his own use and did not, at that time, have the same in his possession, but that he concealed this fact from the Court; that no notice of the application for said order was given to anyone or in any manner; that the application, as appears from the records of this court, and from the said order, was one for authority to borrow the money in his hands; that according to the terms of the order and as recited in said application, it was represented to the Court that he had the moneys in his hands and that it would be a fair and safe investment to [5] allow him to borrow the said funds; that the alleged order of the Court is in words and figures as follows, as entered upon the minutes of the court for the 11th day of December, 1900:

“PROBATE MINUTES, DECEMBER, 1900.

Tuesday, the eleventh day of December, 1900.

255.

Estate and Guardianship of WM. SMITH et al.,
Minors.

Max Waterman, counsel for guardianship, asked to have his name withdrawn as counsel in the case. N. B. Smith asked to have his name entered as counsel instead of the Max Waterman's. John M. Smith, the guardian of said minors, having made application to the Court for an order authorizing him to borrow the funds in his hands belonging to said minors amounting to the sum of about \$82,000 at the rate of three per cent per annum.

The Court being fully advised in the premises: It is Ordered that said guardian be authorized to borrow said sum of \$82,000 at the rate of 3% per annum, and to so hold the same at said interest until the further order of this court.

Order allowing guardian to use money of Estate, signed and filed.

F. K. ARMSTRONG,
Judge."

V.

And said complainant avers and charges, upon his information and belief, that no bond was required or given by the said John M. Smith as borrower; that the bond which he had previously given as guardian did not cover any liability as borrower; that 3% was not a fair or reasonable rate of interest for the said John M. Smith to allow or to be charged against him; that the prevailing rates of interest at the time were from 9% per annum, upwards; that the said John M. Smith was paying to the Union Bank & Trust Company of Helena interest at the rate of 9% per annum on a credit [6] which he had obtained at said bank, and which he paid off with the moneys of said minors and in particular said complainant, as aforesaid; that this sum of eighty-two thousand one hundred seventy-four and 20/100 Dollars (\$82,174.20) which he had received from the executor of the estate of William A. Smith, deceased, as aforesaid, represented part of the payment made by said J. M. Smith himself for property which had belonged to the estate of William A. Smith, deceased, and which had been sold by said executor to the said John M. Smith himself.

That the latter for the purpose of making payment to the executor had borrowed money and had obtained a credit at the said Union Bank and had turned in the funds received from the executor to the said bank and Trust Company in payment of said indebtedness, as this complainant avers on his information and belief; that notwithstanding the making of said order and the attempt thereby to change the position of the said John M. Smith into that of borrower, he continued to act as guardian of the said minors and of this complainant.

That on the 1st day of December, 1906, an account purporting to be the final account of the said John M. Smith, as guardian of said William Smith, was filed in this court; that it appears from said account that John M. Smith was at that time absent from the State of Montana, and that the said account was verified by the said N. B. Smith, who purported to act on behalf of said John M. Smith and as his attorney; that a copy of said account is hereto annexed, marked Exhibit "A" and made a part of this Bill of Complaint.

That this alleged final account purported to show all of the items of receipts and expenditures received and made by the said John M. Smith, as the guardian of this complainant, from June 14th, 1899, to the date of said account, both inclusive, and, therefore, to be a complete account of said guardian; that he had previously [7] filed some accounts, three in number, and the last of these in March, 1903, purporting to be annual accounts; that the alleged final account and all prior accounts filed by the said John M.

Smith were inaccurate, false and fraudulent in this, to wit, that he did not show that he had used himself and appropriated to his own use the money of the said minors and of this complainant, as aforesaid; that he allowed no interest at all on said money up to the 11th day of December, 1900; that thereafter he allowed only three per cent, and that on less than eighty-two thousand dollars; that he did not show any excuse for his not investing the said moneys as he should have done for the benefit of the minors, and particularly of this complainant.

VI.

And this complainant further alleges, on information and belief, that the said John M. Smith was and is chargeable with interest at the rate of eight per cent per annum, compounded annually, on the moneys received by him as guardian of this complainant, and that he was, at the time of his death, indebted to complainant for interest as aforesaid, and that his estate is now indebted to complainant for the sum of seventeen thousand fifteen and 23/100 dollars (\$17,015.23) for the true balance due to this complainant for moneys received on his account by said John M. Smith, as guardian, upon the proper charge and the proper calculation of interest, as aforesaid, up to the 14th day of June, 1908, and in addition thereto, interest thereon at the rate of eight per cent per annum from June 14, 1908.

That a statement of the items of receipts and expenditures and of interest particularly chargeable to and due from said John M. Smith and his estate to the complainant is as follows:

| | | |
|---|--|-------------|
| "Amount received by John M. Smith as guardian of William Smith on June 14, 1899 | | \$27,390.06 |
| Less credit on same day | | 433.33 |
| | | <hr/> |
| | | 26,956.73 |
| Interest to June 14, 1900 | | 2,156.53 |
| | | <hr/> |

[8]

| | | |
|---|--|-------------|
| Rest on June 14, 1900 | | \$29,113.26 |
| Interest to June 14, 1901 | | 2,329.06 |
| | | <hr/> |
| Less credits during year | | 437.00 |
| Balance interest to June 14, 1901 | | 1,892.06 |
| | | <hr/> |
| Rest on June 14, 1901 | | 31,005.32 |
| Interest to June 14, 1902 | | 2,480.42 |
| | | <hr/> |
| Less credits during year | | 483.60 |
| Balance interest to June 14, 1902 | | 1,996.82 |
| | | <hr/> |
| Rest on June 14, 1902 | | 33,002.14 |
| Receipts during year | | 175.00 |
| | | <hr/> |
| Total on June 14, 1902 | | 33,177.14 |
| Interest to June 1, 1903 | | 2,653.17 |
| Less credits during year | | 931.54 |
| | | <hr/> |
| Balance interest to June 14, 1903 | | 1,721.63 |
| Receipts during year | | 145.83 |
| | | <hr/> |
| | | 1,867.46 |
| | | <hr/> |

| | |
|---------------------------------|-----------|
| Rest on June 14, 1903 | 35,044.60 |
| Interest to June 14, 1904 | 2,803.56 |
| Less credits during year | 824.85 |

 1,978.71

| | |
|----------------------------|-------|
| Receipts during year | 87.51 |
|----------------------------|-------|

| | |
|------------------------------|-----------|
| Rest on June 14, 1904 | 37,110.82 |
| Interest for four days | 32.00 |

| | |
|--------------------------------|-----------|
| Total | 37,142.82 |
| Less credit on same date | 150.00 |

| | |
|-------------------------------------|-----------|
| Balance on June 18, 1904 | 36,942.82 |
| Interest to September 8, 1904 | 664.20 |
| Receipts to same date | 29.16 |

| | |
|---------------------------------------|-----------|
| Balance on September 8, 1904 | 37,686.18 |
| Less credit on September 8, 1904 | 708.05 |

| | |
|------------------------------------|-----------|
| Balance on September 8, 1904 | 36,978.13 |
| Interest to October 6, 1904 | 226.00 |

| | |
|----------------------------------|-----------|
| Balance on October 6, 1904 | 37,204.13 |
|----------------------------------|-----------|

[9]

| | |
|--------------------------------|-------------|
| Amount brought forward | \$37,204.13 |
| Less credit on same date | 285.15 |

| | |
|---|-----------|
| <i>Vakabce ib</i> October 6, 1904 | 36,918.98 |
| Interest to June 14, 1905 | 2,030.59 |
| Receipts during year | 58.33 |

L

| | |
|---|-----------|
| Total principal and interest to date .. | 39,007.90 |
| Less credits during year | 461.70 |

| | |
|---------------------------------|-----------|
| Rest on June 14, 1905 | 38,546.20 |
| Interest to June 14, 1906 | 3,083.69 |
| Receipts during year | 58.33 |

| | |
|--|-----------|
| Total balance interest and principal and receipts | 41,688.22 |
| Less credits during year | 1,336.85 |

| | |
|-----------------------------------|-----------|
| Rest on June 14, 1906 | 40,351.37 |
| Receipts to August 21, 1906 | 58.34 |
| Interest to August 21, 1906 | 601.12 |

| | |
|----------------------------------|-----------|
| Balance on August 21, 1906 | 41,010.83 |
| Less credits | 1,000.00 |

| | |
|------------------------------------|-----------|
| Balance August 21, 1906 | 40,010.83 |
| Interest to October 25, 1906 | 569.40 |

| | |
|---------------------------------|-----------|
| Total to October 25, 1906 | 40,580.23 |
| Less credits | 1,400.00 |

| | |
|-------------------------------------|-----------|
| Balance on October 25, 1906 | 39,180.23 |
| Interest to November 30, 1906 | 308.88 |

| | |
|--------------------------------------|-----------|
| Total to November 30, 1906 | 39,489.11 |
| Less credits November 30, 1906 | 512.50 |

| | |
|-------------------------------------|-----------|
| Balance on November 30, 1906 | 38,976.61 |
| Interest to December 15, 1906 | 129.50 |

| | |
|---------------------------------------|-----------|
| Total to December 15, 1906 | 39,106.11 |
| Less credit on December 15, 1906 | 23,954.01 |

| | |
|------------------------------------|-----------|
| Balance on December 15, 1906 | 15,152.10 |
| Interest to June 14, 1907 | 602.75 |

| | |
|-----------------------------|-----------|
| Rest on June 14, 1908 | 17,015.23 |
|-----------------------------|-----------|

[10]

with interest at the rate of eight per cent per annum from June 14th, 1908.

That in the foregoing statement, the said John M. Smith is charged with moneys upon the debts as shown in his account and moneys received by him as such guardian; that wherever any payment made by the said John M. Smith exceeds the interest thus charged by him, as aforesaid, the same is credited to the principal, otherwise the payment is credited on account of interest, but that interest is only compounded annually.

VII.

And this complainant further alleges, on his information and belief, that the said John M. Smith never did obtain a discharge from said Court, and that he died without having obtained any discharge; that this complainant was not present or represented in any manner at the alleged settlement of the final account or of any other account filed by the said John M. Smith in the matter of said guardianship, and that he had no notice or knowledge thereof at the time.

That upon attaining his majority he received from the said John M. Smith the balance which the latter

acknowledged due to him, but that this complainant had then just come of age; that he had no business experience, no knowledge of business or legal matters, had no independent advice and trusted entirely to the said John M. Smith and to his attorney, N. B. Smith; that he had no knowledge that the moneys had been used by the said John M. Smith prior to the 11th day of December, 1900, without any authority and without allowing any interest thereon, and that all he knew about the subsequent use of the money and the allowance of interest was that he was told by them that the Court had allowed and directed the borrowing of this money and the allowance of three per cent interest by the said John M. Smith; that he did not know or understand at the time and had no reason to believe, as far as his information or understanding [11] went, that any fraud had been committed upon him or upon his sisters, and that he did not discover or learn of the fact until the month of August, 1907.

VIII.

And this complainant further avers, on his information and belief, that this claim is not outlawed or affected by the statute of limitations or any other limitation.

That said John M. Smith died on the 6th day of October, 1908, at Battle Creek, Michigan; that he left a will, by virtue of which his widow, Mary M. Smith, was named as executrix of his will; that the said will was duly admitted to probate in the District Court of the then Tenth Judicial District of the State of Montana, in and for the County of

Meagher, and that the said Mary M. Smith was then and there appointed executrix; that her appointment as such took place on the 7th day of November, 1908; that shortly thereafter she duly qualified as such, and that ever since then she has been, and now is, the duly qualified and acting executrix of the said will; that said estate is still undistributed.

That between the date of the majority of this complainant and the date of the death of the said John M. Smith, the latter was absent a great part of the time from the State of Montana, and that the said Mary M. Smith has been absent from the State of Montana a great part of the time since her appointment as executrix, and that by reason of their absences and the deduction of the time provided by law in such cases, the statute of limitations has not run against this claim, as this claimant avers on his information and belief.

That said Mary M. Smith is now, and for a long time prior hereto has been, absent from the State of Montana, as this complainant avers on his information and belief; and this complainant avers that he has not been guilty of any laches in this matter; that his failure to present a claim sooner against the estate was due to the fact that he believed that he had a good cause of action to set aside the sale of the property made to the said John M. Smith by the executor of the [12] estate of William A. Smith aforesaid; that he did bring a suit for the said purpose within one year after his majority, to wit, in the month of August, 1907, and that the said suit was pending in the courts of this State until the 14th

day of November, 1912; that said suit has been dismissed.

IX.

That on the 14th day of March, 1913, this complainant caused to be duly exhibited and presented a claim against the estate of said John M. Smith, containing all the facts and matters hereinbefore set forth, and the full particulars of said claim, as stated herein, and that therein and thereby he claimed to be due to him the sum of seventeen thousand fifteen and 23/100 dollars (\$17,015.23), with interest thereon at eight per cent per annum from June 14, 1908.

That said claim was supported by the affidavit of the claimant, to wit, of this complainant; that the amount thereof was justly due; that no payments had been made thereon, which were not credited, and that there were no offsets to the same, to the knowledge of said affiant.

That the said defendant, in her notice to creditors, designated the office of N. B. Smith, an attorney at law, of White Sulphur Springs, in the State of Montana, as the place at which claims against the estate should be presented, and that said claim of this complainant was duly presented in and at said office and delivered to said N. B. Smith personally, that said N. B. Smith is also the attorney for said estate and for said defendant, as executrix of said estate.

That more than ten days have elapsed since said presentation; that said claim, as *complaint* alleges on his information and belief, has been disallowed

by said defendant, that is to say, that the said defendant did not, within the ten days following the day of the presentation thereof, endorse thereon either allowance or rejection of the same, and that complainant has elected to regard the same as [13] having been rejected; that three months have not elapsed since the presentation of said claim.

X.

And the complainant offers to account fully, on his part, for everything that he has received from said John M. Smith, or that he may be chargeable with, and he is ready and willing, and hereby offers to do and submit to everything that may be equitably required of him in the premises.

WHEREFORE, the complainant prays:

1. That the order made in the matter of the estate of said William A. Smith, Deceased, on the 11th day of December, 1900, and alleged in the foregoing complaint, be set aside or declared to be and to have been of no force or effect;

2. That all and every of the orders purporting to settle or allow any account or accounts of said John M. Smith, as guardian of said complainant, be set aside or declared to have been and to be of no force or effect;

3. That any receipts or acquittances that may have been given by this complainant to the said John M. Smith be also declared to be of no force or effect;

4. That the accounts of the said John M. Smith, as guardian of this complainant, with said complainant be re-opened;

5. That a new account of the guardianship of this

complainant by the said John M. Smith and of the administration by the latter of the guardianship funds and of all moneys and property that came into his hands or under his control, by reason of said guardianship be taken and settled between the complainant and the defendant herein as executrix;

6. That in such account said John M. Smith and the defendant, as his representative, be charged with interest on all moneys received by said John M. Smith, as guardian, and on all moneys for which he was accountable, as such guardian, at the rate of eight per cent per annum compounded annually, and that complainant have and recover [14] from the defendant, as executrix, the balance found due on such account, with interest thereon, to wit, the sum of seventeen thousand fifteen and $23/100$ dollars, at the rate of eight per cent per annum from June 14, 1908, or such sum as may be found due;

7. That meanwhile and pending this suit, the defendant be enjoined from closing up or distributing or disposing of the estate or property of the said John M. Smith;

8. That complainant have such further or other relief as may be proper and agreeable to equity.

C. B. NOLAN,

WM. SCALLON,

Solicitors for Complainant. [15]

Exhibit "A" [to Bill of Complaint].

*In the District Court of the Tenth Judicial District
of the State of Montana, in and for the County
of Meagher.*

In the Matter of the Estate and Guardianship of
WILLIAM SMITH, Minor.

John M. Smith in Account with said Ward.

| Date. | Cash Received. | Amount. |
|-----------|--|------------|
| 1899. | | |
| June 14. | To $\frac{1}{3}$ of \$82170.20—amt. received from N. B. Smith, Executor of Estate of William A. Smith, deceased. | \$27390.06 |
| 1901. | | |
| Sept. 13. | To $\frac{1}{3}$ of \$2426.10—amount interest on \$80870.20 loan at 3% from Dec. 1900 to Dec. 11, 1901, as per order of Court. | 808.70 |
| | To $\frac{1}{3}$ of \$437.50—amt. of dividends 14, 15, 16, 17 from Stock of First National Bank of White Sulphur Springs, Montana | 145.83 |
| 1902. | | |
| Nov. 21. | To $\frac{1}{3}$ of \$2456.16—amt. of interest on \$81872.00, loaned 3% from Dec. 11, 1901, to Dec. 11th, 1902, as per order of court. | 813.72 |

| | | | |
|------|----|--|-------|
| Jan. | 8. | To $\frac{1}{3}$ of \$87,500 Dividend No. 18 from stock of First National Bank, White Sulphur Springs, Montana | 29.17 |
|------|----|--|-------|

| | | | |
|------|----|--|-------|
| July | 5. | To $\frac{1}{3}$ of \$175.00—Dividend No. 19 from stock of First National Bank, White Sulphur Springs, Mont. | 58.33 |
|------|----|--|-------|

1904.

| | | | |
|------|-----|--|---------|
| Aug. | 25. | To $\frac{1}{3}$ of \$4395.80—being interest on \$81762.05 amt. loaned at 3% from Dec. 11, 1902 to Aug. 26, 1904, as per order of Court. | 1465.27 |
|------|-----|--|---------|

[16]

1903.

| | | | |
|------|----|---|-------|
| Jan. | 3. | To $\frac{1}{3}$ of \$262.50, Dividend No. 19 (a) from stock of First National Bank, White Sulphur Springs, Mont. | 87.50 |
|------|----|---|-------|

Amount Brot. forward . . . \$30803.58

1903.

| | | | |
|------|-----|---|-------|
| July | 27. | To $\frac{1}{3}$ of \$87.50 Dividend No. 20, stock of First National Bank, White Sulphur Springs, Montana | 29.17 |
|------|-----|---|-------|

| | | | |
|------|-----|---|-------|
| July | 27. | To $\frac{1}{3}$ of \$87.50 Dividend No. 21, Stock of First National Bank, White Sulphur Springs, Montana | 29.17 |
|------|-----|---|-------|

1904.

| | | | |
|------|-----|--|-------|
| Jan. | 5. | To $\frac{1}{3}$ of \$87.50, Dividend No. 22, Stock of First National Bank, White Sulphur Springs, Montana | 29.17 |
| Aug. | 26. | To $\frac{1}{3}$ of \$87.50—Dividend No. 23, Stock of First National Bank, White Sulphur Springs, Montana | 29.16 |

1905.

| | | | |
|------|----|---|-------|
| Jan. | 3. | To $\frac{1}{3}$ of \$175.00—Dividend No. 24, from Stock of First National Bank, White Sulphur Springs, Montana | 58.33 |
| July | 7. | To $\frac{1}{2}$ of \$58.33—Dividend No. 25, from Stock of First National Bank, White Sulphur Springs, Montana | 29.16 |

1906.

| | | | |
|------|-----|--|-------|
| Jan. | 20. | To $\frac{1}{2}$ of \$58.33—Dividend No. 25, from Stock of First National Bank, White Sulphur Springs, Montana | 29.17 |
| July | 7. | To $\frac{1}{2}$ of \$116.67—Dividend No. 27, Stock of First Na- | |
| [17] | | tional Bank, White Sulphur Springs, Montana | 58.34 |
| Nov. | 30. | To $\frac{1}{3}$ of \$5469.97—being interest on \$8063.97, loaned at 3% from Aug. 26, 1904, to Nov. | |

30th, 1906, as per order of
court..... 1833.32

Total Receipts.....\$32918.57

| Date. | Cash Paid Out Voucher. | Amount. |
|-------|------------------------|---------|
|-------|------------------------|---------|

1899.

| | | | |
|------|-----|---|--------|
| June | 14. | Amt. for education and main- tenance of ward for year ending June 14, 1900..... | 400.00 |
| " | " | Amt. paid Max Waterman Atty. fee..... | 33.33 |

1900.

| | | | |
|------|----|---|--------|
| Oct. | 9. | By $\frac{1}{3}$ of Amt. expended for education and maintenance of Wm. Smith, Anna Maud Smith and Nellie May Smith, minors and wards of said guardian, viz.: \$300.00..... | 100.00 |
| Dec. | 8. | By $\frac{1}{3}$ of \$6.00, amt. expended for photos of grave of W. A. Smith, deceased, father of said minors..... | 2.00 |

1901.

| | | | |
|-------|-----|---|--------|
| March | 30. | By $\frac{1}{3}$ of \$400.00, amt. ex- pended for education and maintenance of above minors..... | 133.33 |
| May | 15. | By $\frac{1}{3}$ of \$600.00, amt. ex- pended for education and maintenance of minors above named..... | 200.00 |
| June | 3. | By $\frac{1}{3}$ of \$5.00, amt. expended | |

| | | | |
|-------|-----|---|--------|
| | | for fixing grave of W. A. Smith, deceased | 1.67 |
| July | 18. | By $\frac{1}{3}$ of \$50.00, amt. of attorneys fees paid Max Waterman..... | 16.67 |
| Aug. | 19. | By $\frac{1}{3}$ of \$400.00, amt. expended for education and maintenance of minors above named..... | 133.33 |
| Sept. | 13. | By $\frac{1}{3}$ of \$100.00, amt. of attorney's fee paid N. B. Smith.. | 33.33 |
| [18] | | | |
| Sept. | 13. | By $\frac{1}{3}$ of \$80 cost of drafts to Mrs. Reynolds | .27 |
| Dec. | 24. | By $\frac{1}{3}$ of \$400.00, amt. expended for education and maintenance of minors above named..... | 133.33 |
| 1902. | | | |
| April | 5. | By $\frac{1}{3}$ of \$400.00, amt. expended for education and maintenance of minors above named..... | 133.33 |
| April | 5. | By $\frac{1}{3}$ of \$15.00, amt. expended for marking tomb of W. A. Smith, deceased, father of minors..... | 5.00 |
| Mar. | 4. | By $\frac{1}{3}$ of \$100.00 amt. of attorney's fee paid N. B. Smith.. | 33.33 |

Amt. Brot. forward..... \$1358.92

1902.

| | | | |
|-------|-----|---|--------|
| Aug. | 4. | By $\frac{1}{3}$ of \$400.00, amt. expended for education and maintenance of minors above named..... | 133.34 |
| Sept. | 2. | By $\frac{1}{3}$ of \$800.00, amt. expended for education and maintenance of minors above named..... | 266.67 |
| " | " | By $\frac{1}{3}$ of amt. expended for traveling expended of minors above named to Boston, Washington, etc., amt. expended \$392.61..... | 130.87 |
| Oct. | 15. | By $\frac{1}{3}$ of \$95.00, amt. expended for education and maintenance of minors above named..... | 31.67 |
| Dec. | 19. | By $\frac{1}{3}$ of \$400.00, amt. expended for education and maintenance of minors above named.... | 133.33 |

1903.

| | | | |
|------|----|---|-------|
| Jan. | 3. | By $\frac{1}{3}$ of \$55.00, amt. expended for education and maintenance of minors above named..... | 18.33 |
| " | 9. | By $\frac{1}{3}$ of #145.00, amt. paid William Scott for repairing monument, W. A. Smith, Deceased..... | 48.33 |

| | | | |
|-------|-----|---|--------|
| April | 4. | By draft Mrs. D. B. Reynolds bill of minors..... | 100.00 |
| May | 2. | By draft to minor to settle bills..... | 64.00 |
| Aug. | 19. | Check to minor to settle bills.. | 30.00 |
| Aug. | 17. | By check to minor to settle bills..... | 50.00 |

[19]

| | | | |
|------|-----|--|--------|
| Aug. | 19. | By draft Mrs. D. B. Reynolds \$150.00 settle board bill minor..... | 150.00 |
| Oct. | 22. | By draft to minor settle bills. | 75.00 |
| Dec. | 18. | By draft to minor..... | 100.00 |

1904.

| | | | |
|-------|-----|--|--------|
| Feb. | 13. | By draft to minor settle bills.. | 119.85 |
| April | 22. | By draft to Mrs. D. B. Rey- nolds settle bill of minor... | 150.00 |
| May | 5. | Draft minor trip to Montana. | 110.00 |
| June | 18. | By draft Mrs. D. B. Reynolds bill of minor..... | 150.00 |
| July | 23. | Check settle minors bills..... | 196.20 |
| Sept. | 8. | By check Wm. Smith, minor, school purposes..... | 500.00 |
| Sept. | 8. | By check H. E. Marshall, bills minor..... | 11.85 |

Total.....\$3,968.36

1904.

| | | | |
|------|-----|--|--------|
| Oct. | 6. | By draft for Shattuck School for minor No. 1..... | 285.15 |
| Aug. | 31. | By check to minor No. 2..... | 5.00 |

| | | | |
|-------|-----|--|--------|
| Nov. | 19. | By draft to Shattuck School for minor No. 3..... | 50.00 |
| " | 19. | By check E. G. Hartfield Tel. for minor No. 4..... | 1.10 |
| Dec. | 10. | By check to minor school pur- poses No. 5..... | 150.00 |
| 1905. | | | |
| Jan. | 11. | By check minor school pur- poses No. 6..... | 60.10 |
| Jan. | 11. | By draft Jas. Dobbins for minor No. 7..... | 50.00 |
| Feb. | 14. | By draft Mrs. Reynolds, minor's bill No. 8..... | 75.00 |
| April | 21. | By check telegrams, for minor No. 9..... | 2.50 |
| May | 4. | By draft Mrs. D. B. Reynolds minor's bill No. 10..... | 68.00 |
| Sept. | 18. | By cash to minor school pur- poses No. 11..... | 40.00 |
| Sept. | 25. | By check school purposes No. 12..... | 310.00 |
| Nov. | 9. | By cash paid telegram from minor..... | 1.85 |
| Oct. | 9. | By check paid minor school purposes No. 13..... | 70.00 |
| Nov. | 28. | By check paid minor school purposes No. 14..... | 85.00 |
| [20] | | | |
| Dec. | 16. | By check paid minor school purposes No. 15.....\$ | 35.00 |

| | | | |
|-------|-----|---|---------|
| “ | 29. | By check paid minor school purposes No. 16..... | 25.00 |
| “ | 29. | By check paid minor school purposes No. 17..... | 175.00 |
| “ | 29. | By check to Smith Bros. Sheep Co. loan No. 18..... | 10.00 |
| 1906. | | | |
| Feb. | 16. | By check to minor for school purposes No. 19..... | 100.00 |
| Feb. | 27. | By check to minor for school purposes No. 20..... | 85.00 |
| Mar. | 26. | By check to minor for school purposes No. 21..... | 75.00 |
| April | 12. | By check to minor for school purposes No. 22..... | 25.00 |
| “ | 30. | By check to minor for school purposes No. 23..... | 75.00 |
| June | 1. | By check to minor for school purposes No. 24..... | 225.00 |
| June | 10. | By check to minor for school purposes No. 25..... | 150.00 |
| Aug. | 4. | By check to minor for school purposes No. 26..... | 150.00 |
| | | By check for school purposes and to pay debts No. 27..... | 700.00 |
| Oct. | 23. | By check for school purposes and to pay debts No. 28..... | 300.00 |
| “ | 25. | By cash advanced minor for school purposes and to pay debts No. 29..... | 1100.00 |
| Nov. | 30. | By 1/3 of \$787.50, cost guardian's bond for 7 years No. 30. | 262.50 |

“ 30. By N. B. Smith, attorney's $4\frac{1}{2}$
years. No. 31..... 250.00

Total \$8964.56

SUMMARY.

Total amount of cash received by Guardian.....\$32918.57

Total amount of cash paid out by Guardian..... 8964.56

Balance on hand.....\$23954.01

LIST OF PROPERTY OWNED IN COMMON,
BY WILLIAM SMITH, ANNIE MAUD [21]
SMITH, AND NELLIE MAY SMITH, AS
SHOWN BY THE INVENTORY OF ES-
TATE OF SAID MINORS.

171½ Shares of the Capital Stock of the First Na-
tional Bank of White Sulphur Springs, Montana.

10,000 Shares of Stock of the Satellite Mining
Company.

187,500 Shares of the Capital Stock of the Black
Hawk Mining Company.

190,500 Shares of the Capital Stock of the Alice
Mining Company.

Said ward, William Smith, owns an undivided
one-third interest in the above-described personal
property.

An undivided one-half interest in eight town lots
in Higgins Townsite of White Sulphur Springs,
Montana, being Lots 20 and 21 in Block 22; and
Lots 1, 2 and 3 in Block 30; and Lots 13, 14 and 15
in Block 11.

An undivided one-half interest in two town lots, in Park Addition to the City of Livingston, Montana, being Lots 8 and 25 in Block 22, according to the plat filed in the office of the recorder of Deed in Gallatin County.

Said ward, William Smith, has an undivided one-sixth interest in the above-described real property. All vouchers, the numbers of which are omitted in the foregoing account, were filed with the several annual accounts, in the Matter of the Estate and Guardianship of William Smith, Annie Maud Smith, and Nellie May Smith, minors of record in this Court.

[Indorsed]: Title of Court and Cause. Bill of Complaint. Filed May 17, 1913. Geo. W. Sproule, Clerk. [22]

Thereafter, on July 11, 1913, an alias subpoena in equity was duly issued herein, which said subpoena with proof of service thereof is in the words and figures following, to wit: [23]

Alias Subpoena.

UNITED STATES OF AMERICA.

*District Court of the United States, District of
Montana.*

IN EQUITY.

The President of the United States of America,
Greeting: To Mary M. Smith, as Executrix of
the Will of John M. Smith, Deceased, Defendant.
You are hereby commanded, that you be and ap-

pear in said District Court of the United States aforesaid, at the courtroom in Federal Building, Helena, Montana, on the 31st day of July, 1913, to answer a Bill of Complaint exhibited against you in said court by William Smith, complainant, who is a citizen of the State of California, and to do and receive what the said court shall have considered in that behalf. And this you are not to omit, under the penalty of Five Thousand Dollars.

WITNESS, the Honorable GEO. M. BOURQUIN, Judge of the District Court of the United States for the District of Montana, this 11th day of July, in the year of our Lord one thousand nine hundred and thirteen, and of our Independence the 137.

[Seal]

GEO. W. SPROULE,

Clerk.

By C. R. Garlow,

Deputy Clerk.

MEMORANDUM PURSUANT TO RULE 12, SUPREME COURT U. S.

You are hereby required, to file your answer or other defense in the clerk's office of said court on or before the twentieth day after service, excluding the day thereof; otherwise the bill may be taken *pro confesso*.

[Seal]

GEO. W. SPROULE,

Clerk.

By C. R. Garlow,

Deputy Clerk.

C. B. NOLAN and

WM. SCALLON,

Solicitors for Complainant, Helena, Montana.

United States Marshal's Office,
District of Montana.

I hereby certify, that I received the within writ on the 14th day of July, 1913, and personally served the same on the 15th day of July, 1913, by delivering to, and leaving with Mary M. Smith, as executrix of the will of John M. Smith, deceased, said defendant named therein, personally, at 4½ miles west of Martinsdale, in the county of Meagher, in said district, a copy thereof.

WILLIAM LINDSAY,

U. S. Marshal.

By Thad C. Pound,

Deputy.

Helena, July 17th, 1913.

[Endorsed]: No. 5. U. S. District Court, District of Montana. In Equity. Wm. Smith vs. Mary M. Smith, as Executrix. Alias Subpoena. Filed July 24th, 1913. Geo. W. Sproule, Clerk. By _____, Deputy Clerk. [25]

Thereafter, on July 30, 1913, defendant's answer was duly filed herein, in the words and figures following, to wit: [26]

*In the District Court of the United States, in and for
the District of Montana.*

WILLIAM SMITH,

Complainant,

vs.

MARY M. SMITH, as Executrix of the Estate of
JOHN M. SMITH, Deceased,
Defendant.

Answer.

Comes now the said defendant and for answer to the bill of complaint herein:

I.

She, said defendant, avers that she is without knowledge as to whether complainant is or was at any time therein stated a citizen and resident of the State of California.

II.

Said defendant admits so much of the paragraph III of said bill of complaint as is contained on line 25 of page 1 of said bill of complaint down to line 13 on page 2 thereof, but she denies that the testator, John M. Smith, appropriated or converted all or any moneys of the complainant to his own use, or that he did not invest or otherwise properly handle any moneys held by him as guardian, either wilfully or otherwise, or that he retained or converted any in-

terest in such moneys, or that he received, or converted to his own use any dividends or other moneys, or that he as guardian failed to charge himself as such guardian with any and all moneys belonging to the said complainant. She admits that on, to wit, the 11th day of December, 1909, a certain order was made and entered in and by the Dictriect Court of the (then) Ninth Judicial District of the State of Montana, in and for the County [27] of Meagher, wherein the matter of the guardianship of said complainant was then pending, wherein and whereby the said John M. Smith, as guardian, was authorized to lend to himself individually the sum of \$82,000.00 at the rate of 3 per cent per annum, but she avers and alleges that said order was by said court duly made and entered in exercise of the power and discretion of said court in said guardianship matter; and she admits that from and after the rendition and entry of said order the said John M. Smith in pursuance thereof received the moneys therein mentioned and charged himself and credited the said complainant with the moneys and interest as therein he was ordered to do.

III.

Defendant admits that the copy of the order contained in paragraph IV of said bill of complaint is correct, but she denies that the same was void or made without authority of law; denies that it was fraudulently obtained or that it was a fraud upon the Court; denies that when it was obtained or at all the said John M. Smith had appropriated any moneys to his own use, or that he did not have it in

his possession, but, on the contrary, she avers and alleges that all the facts and circumstances of the guardianship matter therein referred to were fully and truthfully represented and made known to the Court and that it was fully informed and apprised of the same, and acted upon such knowledge in the rendition and making of said order.

IV.

That as to the matters and things contained in paragraph V of said bill of complaint, and particularly those contained on page 4, lines 24 to 33, and page 5, lines 1 to 18, this defendant is informed and believes and so alleges that the bill of complaint is insufficient of fact to constitute a valid cause of action in equity, and in accordance with Equity Rule [28] 29, of this Court, she prays the judgment of this Court thereon.

In further answer to said paragraph V, this defendant admits the filing of the final account as therein stated, but denies that the same was in any respect inaccurate, false, or fraudulent, or that it does not fully and truthfully set forth and represent the state of the account from said John M. Smith to said complainant; and defendant further avers that said final account came on duly to be heard by the said District Court; that said Court on, to wit, the — day of —, 19—, duly gave and made its order and judgment settling, approving and allowing the same, and did also duly give, and make its order and judgment discharging the said John M. Smith from any and all liability, duty and responsibility in and about his guardianship of the person

and estate of said complainant, of all of which he had full notice and knowledge, and that no appeal has ever been taken therefrom.

V.

As to matters set forth in paragraph VI of said bill of complaint, this defendant denies that her said testator or his said estate was or is chargeable with the sum therein mentioned, or in any sum, either by way of interest or otherwise, to complainant.

VI.

This defendant denies that said John M. Smith was not discharged from the guardianship referred to in paragraph VII of said bill of complaint; denies that said complainant was not represented at the settlement of the said guardianship's accounts; and denies that he had no notice or knowledge thereof. Defendant avers that she is without knowledge as to whether complainant was ignorant of business or legal matters at the time he and his said guardian, John M. Smith, had their final accounting and settlement; denies that he was not fully informed at the [29] time of such settlement of the matters and things had and done during the course of such guardianship; and denies that any fraud had ever been committed upon him by the testator of the defendant.

VII.

To paragraph VIII of the said bill of complaint this defendant on her information denies that the claim, if any he has, of complainant is not outlawed or affected by the statute of limitations or any other limitation, but, on the contrary, she avers that such claim is barred by the provisions of subdivision 4 of

section 6449, and of section 6451 of the Revised Codes of Montana, and by reason of the failure of complainant to present his alleged claim, duly verified, to this defendant as the executrix of the estate of John M. Smith, within the period of publication of notice to creditors, which notice was duly given and published in pursuance of Section 7522 of the Revised Codes of Montana, beginning on the 18th day of December, 1908, as required by the statutes of the State of Montana in that behalf, said claim, if any, became and is barred.

Defendant admits so much of said bill of complaint as is contained in paragraph VIII, in lines 8 to 18, inclusive, of page 10 thereof; but she denies that her testator, John M. Smith, was absent from the State of Montana for a great part of the time, or that he was absent therefrom save temporarily; and she denies that she, since her appointment as executrix, as in said paragraph alleged, has been absent from the State of Montana for a great part of the time, or otherwise than temporarily; and she avers and alleges that in the said notice to creditors, the office of N. B. Smith, attorney at law, who was the attorney for defendant and of said estate, at White Sulphur Springs, County of Meagher, State of Montana, was designated as the place for creditors [30] of and claimants against said estate to present and exhibit their claims against said estate, and that there has been no time during the said period of publication when said complainant could not have presented and exhibited any claim he might have had against said estate for allowance or rejection as is provided for

in the Statutes of the State of Montana in that behalf; defendant denies that she is absent from the State of Montana, and avers that she is without knowledge of complainant's reason for his failure to present and exhibit any claim he might have had against said estate for rejection or allowance, and as to the matters and things in said paragraph set forth she is informed and believes, and so alleges that the said bill of complaint is insufficient in fact to constitute a valid cause of action in equity, and in accordance with Equity Rule 29 of this Court, she prays the judgment of this Court thereon.

VIII.

Defendant denies that complainant ever duly exhibited or presented any claim against the estate of said John M. Smith, and she admits that whatever he did in that regard was and is as set forth in paragraph IX of said bill of complaint, but as to the same she is informed and believes and so alleges that the said bill of complaint is insufficient of fact to constitute a valid cause of action in equity, and in accordance with Equity Rule 29 of this Court, she prays the judgment of this Court thereon.

IX.

And for further answer and defense to the bill of complaint herein this defendant does aver and allege that heretofore, to wit, on the 15th day of September, 1911, in an action then pending in the District Court of the Tenth Judicial District of the State of Montana, in and for the County of Meagher between the said William Smith, plaintiff, and said Mary M. Smith, [31] as executrix of the estate of John M.

Smith, deceased, defendant, and wherein was involved, brought into question, determined and adjudicated the same matters and things and pretended cause of action as are set forth in the bill of complaint herein, judgment was duly given and made by said Court in favor of the defendant and against the said plaintiff that the said complainant recover nothing by reason of his action and that defendant have judgment against the said complainant for costs and disbursements amounting to the sum of \$7.50; that thereupon the said complainant duly prosecuted an appeal from said judgment to the Supreme Court of the State of Montana, in which last named court such further proceedings were had and done that on, to wit, the 10th day of June, 1912, judgment was by said Court duly given and made that said judgment of said District Court be and the same was duly affirmed; and on, to wit, the 14th day of November, 1912, a petition for a rehearing, which was by said complainant filed and presented in said cause in said Supreme Court, was by the said Court overruled and denied.

X.

And for further answer and defense to said bill of complaint this defendant does aver and allege that the said complainant attained the age of twenty-one years on, to wit, the 10th day of October, 1906, and that any cause of action which he might have had against the said John M. Smith or against his estate is barred by the provisions of subdivision 4 of section 6449 and section 6451 of the Revised Codes of the State of Montana of 1907, and that said cause of

action did not accrue within five years of the commencement of the present action, to wit, the 17th day of May, 1913.

XI.

And for further answer and defense to said bill of complaint this defendant does aver and allege that the John M. [32] Smith mentioned and referred to in said bill of complaint died on the 6th day of October, 1908; that at the time of his death he was a citizen of the State of Montana and a resident of the county of Meagher therein; that he left a last will and testament, wherein this defendant was named and designated as executrix, which will was duly admitted to probate by the District Court of the Tenth Judicial District of the State of Montana in and for the County of Meagher, which Court had jurisdiction of said estate; that upon the 7th day of November, 1908, by the order and judgment of said Court duly made and given in the matter of said estate, letters testamentary were duly issued to this defendant, and she qualified as executrix of said will and of said estate and her appointment as such executrix has never been revoked, and she has been since then and is now the duly appointed, qualified and acting executrix of said will and of said estate; that in pursuance of Section 7522 of the Revised Codes of the State of Montana of 1907, and as such executrix, she caused notice to be given and published to all persons having claims against said estate to present and exhibit the same with the necessary vouchers, as required by the laws of said State, and in said notice the office of N. B. Smith, at the town of White Sulphur Springs,

Meagher County, Montana, was designated as the place where said claims might be presented and exhibited, the said N. B. Smith being an attorney at law and being the attorney of said executrix and of said estate; that said notice to creditors and claimants was, in accordance with the order of said Court in that behalf, duly published in the Meagher County Republican, that being a newspaper of general circulation, regularly published and issued at said White Sulphur Springs, in said county of Meagher, and being the newspaper designated by said Court for said purpose, for not less than once a week for more than four weeks, the first publication [33] thereof being in the issue of said newspaper of December 18th, 1908, and the time expressed in the said notice being ten months after the first publication thereof, said estate exceeding in value the sum of ten thousand dollars, as provided in section 7523 of the Revised Codes of Montana of 1907; that no claim of any kind of said complainant against said estate was presented or exhibited to her either in person or at the office of said N. B. Smith during such period of publication or at all, save that on March 14, 1913, and long after the expiration of said notice and publication, a claim was presented and exhibited as is alleged in paragraph IX of the bill of complaint; that such claim was rejected and disallowed, and this defendant does aver and allege on her information and belief that if the same ever had any validity the same is now barred as provided by sections 7525 and 7532 of the Revised Codes of the State of Montana of 1907, and complainant is precluded from further asserting or insisting

on the same; and that at the several times hereinbefore mentioned the complainant was a citizen and resident of the State of Montana, was present therein, and was fully aware of the matters and things herein averred, and there were no obstacles or reasons to prevent him from presenting or exhibiting any claim he might have had against said estate, as the statutes of Montana require.

Wherefore, having fully answered the bill of complaint herein, defendant prays to be hence dismissed, with her costs and disbursements in this behalf expended.

R. LEE WORD,
H. G. McINTIRE,
S. H. McINTIRE,

Solicitors for Defendant.

H. G. McINTIRE, of Counsel.

[Indorsed]: Title of Court and Cause. Answer.
Filed July 30, 1913. Geo. W. Sproule, Clerk.

Service of the within Answer and receipt of a copy thereof this 30th day of July, 1913, is hereby admitted and acknowledged.

C. B. NOLAN,
WM. SCALLON,
Solicitors for Complainant. [34]

That the Statement of the Evidence herein, as approved by the Court and filed on April 22, 1914, is in the words and figures following, to wit: [35]

**Statement of Evidence to be Included in Record on
Appeal.**

*In the District Court of the United States, in and for
the District of Montana.*

WILLIAM J. SMITH,

Complainant,

vs.

**MARY M. SMITH, as Executrix of the Will of
JOHN M. SMITH, Deceased,**

Defendant.

**[Excerpt from Testimony of John M. Smith in Smith
vs. Smith, etc., in District Court of Meagher
County, Montana.]**

On the trial of said cause the plaintiff introduced in evidence following from the testimony of John M. Smith, as found in the record on appeal to the Supreme Court of the State of Montana, in the case of William Smith, Plaintiff, vs. Mary M. Smith, as Executrix et al., Defendants:

The witness remembered that the executor turned the money over to him as guardian, but he cannot give the date. He did not advise or counsel with the executor, neither at the time or before or immediately after he received the money, as to what he was going to do with it. He and the executor had talked about putting the money in Government bonds if they sold the property. It was a poor plant to sell to an outside party. If he was guardian his intention was to place the money in Government bonds in order to take no chance of loss. The witness gave

the executor a receipt for the money when he received it. When the witness got the money he took it and paid off the notes he owed at the bank. He did not advise with N. B. Smith about that disposition of the money before he used it. The witness acted on his own judgment. N. B. Smith did not know the use the witness made of the money until quite a [36] while afterward. The witness stated his reasons for so using the money. He had given bonds for the safekeeping of that money and could have placed it in Government bonds, but thought he would just take the money and pay off these notes and pay interest just the same as Government bonds. At one time the witness thought of paying four per cent interest, but it was some time after that, probably fifteen or eighteen months, before the witness got the order he had applied for to pay three per cent, same as Government bonds. He learned for the first time on the trial that in the final settlement, interest had not been credited from the time the witness used the money, but only from the time the order was given.

The witness testified he had used the money turned over to him by N. B. Smith, when he was appointed guardian, to pay his notes at the bank. The money turned over was in the form of certificates of deposit. It wasn't counted out as cash. The certificates of deposit were turned over to him as guardian of the children of William Smith by the administrator. Witness turned them into the bank in payment of his note and thought he had a right to do so because he had given security for the amount. He understood

he was using money of minors for his own purposes; that he had a right to do so; that he did not talk with anyone about it; that as he had given security for that money, it was the same as though it was in his possession; that he may have made a mistake in so doing, but he did not do it with the intention of defrauding anybody. That he knew he was paying off his indebtedness and using the money of minors that he had given security for without asking anybody's permission; that he did not do it with the intention of defrauding anybody and that if he has wronged anybody in any way, he is willing to make it right. The witness thought this way at the time: That it was just the same if he put the money [37] in Government bonds if he paid the same interest. He acknowledged it may have been wrong, but he did not do it with the intention of defrauding anyone; that he paid off his note and that is the condition of things just as they were. If another party had bought and the money had been turned over to the witness he would have put it in Government bonds, that was his full intention; that he did not consider the question as to his willingness if an outsider had bought the stock of the minors, that they should simply give a bond and keep the money until the children became of age, or for any time. He did not think anything about it; that it might have been partiality on his part because he felt like paying off his notes. The witness thought that the money was lying there and that he would give security and that he would pay it back if it took the last dollar he had on earth. The witness arranged with the bank for a credit of

\$90,000; certificates of deposits were issued to N. B. Smith, turned back to the witness and by him turned into the bank. All that the witness was out was the interest paid between the date of the issuance of the certificates up to the date when they were turned into the bank and the \$85,000 he paid N. B. Smith. He paid N. B. Smith this through the bank. The witness received \$82,000 from N. B. Smith and then the witness paid his notes and enough more to pay \$85,000.

[Excerpt from Testimony of N. B. Smith, in Smith vs. Smith, etc., in District Court of Meagher County, Montana.]

The plaintiff introduced in evidence the following from the testimony of N. B. Smith in said cause of William Smith, Plaintiff vs. Mary M. Smith, as executrix, et al., Defendants:

Witness is shown Defendants' Exhibit No. 59, a certified copy of the bond given by John M. Smith as guardian of the three children of William A. Smith. It never occurred to the witness that the bond wasn't good as to money which might be borrowed by John M. Smith from the estate of his wards; that is a proposition of law, the condition of the bond is he shall faithfully execute his trust according to law. Witness knows of no other bond [38] filed in court by John M. Smith, as guardian of the children of William A. Smith. Witness was not attorney for John M. Smith when the bond was filed. Witness does not know of any bond John M. Smith filed as borrower. Witness does not know of any bond given to secure the repayment of the sum of \$83,000 that

John M. Smith borrowed from the children's estate. Witness does not remember about getting the order of Court permitting the borrowing of the money. Order is in the handwriting of Mr. Badger, at one time Clerk of the Court. Witness does not know who paid the premium on the bond. The witness prepared the final account of John M. Smith, as guardian.

Attention of the witness was directed to Defendant's Exhibit 66, being a letter from the witness to the complainant, dated August 13, 1903. Witness says statement found in the letter that Uncle John gave a big trust company surety for the money which made everything safe and the Court gave him permission to use the money, provided he paid four per cent per annum on the same, was a mistake; that such a statement appears in the letter, above referred to; that the big trust company referred to was the Fidelity and Guaranty Company. The four per cent referred to in the letter is a mistake. Witness does not know how it occurred. He does not know how he could have gotten that into his head, except through this talk with Uncle John when he said he paid four per cent interest. This talk occurred in the office of the witness in White Sulphur Springs in the year 1899. He thought in the Fall of 1899. Over a year after that the order was made allowing John M. Smith to borrow the money, and that order provided for three per cent interest. Witness prepared final account and the various annual accounts from time to time, up to the end of the estate. He never allowed four per cent interest. [39] The witness

wrote to his aunt in October, 1899, that John M. was to pay four per cent interest and he must have had a talk before October, 1899, that John M. was to pay four per cent interest. That is the only way he can fix the date. Witness had no order to borrow this money in October, 1899. He had nothing to do with that part of it. He understood from John Smith that he was to pay four per cent interest. Witness did not prepare or procure the order providing for three per cent interest and the witness computed the interest according to the order. Witness has learned from John M. Smith in or before October that John M. Smith was using this money for his own purposes. Witness thinks John M. Smith told him of this; that this is his recollection. Witness thinks John M.'s memory is at fault when he says he never told anyone about using the money to pay off his own debts. Witness jogged John M. Smith up on the proposition that they had to pay the estate's interests and the witness made the mistake in telling Mrs. Moore, who is the person most interested.

Counsel for plaintiff also introduced in evidence pages 126 to 128, of appellant's brief in chief in the case of William J. Smith vs. Mary M. Smith, in the State Supreme Court, which pages are as follows:

[Excerpt from Appellant's Brief in Smith vs. Smith, etc., in District Court of Meagher County, Montana.]

If, however, the Court should find itself unable to agree with the counsel for appellant as in this brief set out, to such an extent at least as to move it to void the sale of the stock or to hold it to have been

made in trust, equity demands that in lieu of such relief, it requires the representative of John M. Smith to account for the use of the money of the appellant from the time he misappropriated it to the time of his alleged settlement with him. He does not claim such accounting specifically in his bill of complaint, because [40] relief of that character proceeds upon the basis of an affirmance of the sale. He could not make such specific claim and maintain his action. But the Court may properly say that it finds the sale itself not open to attack, but that in affirming it the guardian must be held answerable for interest on the moneys of the wards which he used to pay the notes he gave for the credit which enabled him to make the purchase, at the same rate that he would have been obliged to pay had he obtained it elsewhere.

Of course, accounting by fiduciaries of every character is a well-recognized branch of equity.

1 Ency. of P. & P. 96.

1 Cyc. 416-427.

John M. Smith was certainly under obligation, upon the most favorable view that can be taken either of the law or the facts of this case, to account to his wards for interest on \$85,000 from June 17, 1899, when he actually appropriated their money to his own use, down to the time that he made settlement with them, respectively, at the current rate of interest, as against nothing to December 11, 1899, and three per cent annually thereafter, with annual rests as is expressly pointed out by the statute.

“A trustee must invest money received by him under the trust, as fast as he collects a sufficient sum, in such manner as to afford reasonable security and interest for the same.”

Section 5396, Revised Codes.

“If a trustee omits to invest the trust moneys according to the last section, he must pay simple interest thereon, if such omission is negligent merely, and compound interest if it is wilful.”

Section 5397, Revised Codes.

It certainly does little credit to his memory on the part of his heirs to resist such an account. It would have exhibited him in a better light than this record leaves him if on learning that the law exacted as much of him he had promptly [41] advised his counsel to consent to suffer a judgment for what was justly due from him to his nephew. The best terms he could make with the bank for the loan of the money to make the purchase was nine per cent. The undisputed evidence is that the going rate was from 10 to 12 per cent.

The appellant is not seeking such a judgment, but if he is not entitled to the relief he seeks, the undisputed evidence in the record, admitted without objection, shows that he is at least entitled to a decree of that character.

A decree affirming a sale made under circumstances such as are disclosed by this record would be an unfortunate invitation to all sorts of machinations for the acquisition of the property of orphans for selfish purposes, to the destruction of their heritage and the calamitous undermining of the homely virtue of common honesty.

[Excerpt from Respondent's Brief in Smith vs. Smith, etc., in District Court of Meagher County, Montana.]

Also part of respondent's brief in the same cause, beginning with the paragraph entitled "Accounting for Interest," found on pages 196 and 197 thereof, as follows:

The last three pages of counsel's brief urge that in this suit the Court dispose of this question, and criticises appellees for not offering to account therefor. Counsel admits that no such relief could be granted save upon the affirmance of sale and that it could not be sought by appellant because inconsistent with his present offer to annul the sale. It is impossible to conceive of relief founded on the theory of a valid sale in an action brought to avoid it. Had an attempt been made in the lower court to amend the action to one of accounting upon a valid sale, it could not have been done.

Kramer vs. Gille, 140 Fed. 682-83.

U. P. Ry. vs. Wyler, 158 U. S. 253.

Had this suit, as originally begun, been for the interest anterior to the court order authorizing the loan, no one can [42] doubt from John M.'s attitude upon the witness-stand that he would have directed his counsel to have admitted the mistake. Indeed, had appellant or his counsel when, as alleged in the complaint, the latter demanded a return of the stock, called attention to the mistake as to interest from June, 1899, to December, 1900, it would have been promptly paid. But this fact, within the knowl-

edge of appellant's agent, was withheld—possibly for its moral effect—and this action begun, charging criminal conspiracy to wrong these children and also embezzlement. And those charges, despite the compelling evidence to the contrary, are to-day urged by appellant before this court John M. neither committed nor confessed crime; and he could not in this action, grounded on such charges, do otherwise than resist recovery. His course of action cannot be outlined for him by those who are still seeking to blacken his memory by criminal accusation. When appellant abandons the charge of fraud, and embezzlement; confesses that the sale was a genuine sale in good faith for adequate value; and asks for interest during the accidentally omitted period, then those charged with the protection of the dead man's good name can recognize the mistake in accounting, without stain to his memory.

[Excerpt from Appellant's Brief on Petition for Rehearing in Smith vs. Smith, etc., in District Court of Meagher County, Montana.]

Also part of appellant's brief on petition for rehearing, beginning with the third line from the bottom of page 31 to page 38, inclusive, which is as follows:

But if the Court should feel constrained not to open the cause for further discussion on the voidability of the sale, if it should adhere to the conclusion that the sale should be affirmed, certainly it ought to give to the appellant the correlative relief to which he is confessedly entitled—an accounting for inter-

est unjustly withheld from him upon the settlement.
[43]

Even the counsel for the respondents admit that interest should have been calculated in the settlement from June 17, 1899, instead of from December 11, 1900. Everybody concerned at the hearing admitted it and both John M. and N. B. asserted that the omission was an inadvertent mistake. One troubled with a suspicious mind would regard it as a strange mistake.

But let it be assumed that it was an honest mistake. The integrity of John M. will be best vindicated by "those charged with the protection of the dead man's good name" (Brief of Respondents, page 197), by a frank offer to allow judgment to be taken for such amount as upon an accounting it shall appear he ought to have paid, over and above what he did pay for the use of his ward's money.

In view of the eulogies paid by counsel for the respondents both in the brief and in the oral argument to John M. Smith, as a man of honor, and of honesty, nothing less can be expected of them.

In view of the grounds advanced by the Court in support of its conclusion, it will, the appellant believes, be pleased to require what equity and justice demanded of John M. Smith toward his nephew in the settlement with him.

It is insisted that equity and justice demanded that he pay just what he would have been obliged to pay anyone else,—namely, nine per cent.

Unquestionably either that rate or the legal rate should be made the basis of computation unless the

order fixing the rate at three per cent, is valid. That it is not, is indubitable upon the authorities referred to. And, of course, the oral consultation with the Judge has no efficacy whatever.

“Conventions between the guardian and judge of the court preceding the investments, and verbal advice of the latter to make them, cannot be held to operate as orders and directions which the statute authorizes the court to make in the premises. [44] They may go to show the guardian’s good faith, and the knowledge of the judge at the time of entering the orders of approval. But the advice of a judge given verbally under such circumstances is not to be regarded as tantamount to an order contemplated by section 4922.”

Nagle vs. Robins, 62 Pac. 154–157.

Dismissing, then, the order, the prevailing rate of interest, certainly nothing less than the legal rate, must be exacted. And the rule is universal that when the trustee uses the trust funds, annual rests may be made in the accounting with him.

Woerner on Guardianship, 67.

Berney vs. Saunders, 16 How. 533–542.

Under the authorities referred to, the guardian did not “invest” the funds and the statute requires him to return compound interest.

Civil Code, Section 3014.

Had he made annual reports as it was his duty to do, the interest accumulating annually would have gone into the annual balance and become a part of the principal for the succeeding year.

To the obtaining of this alternative relief a technical objection may, perhaps, be urged that the complaint does not ask for relief of that character, but it is scarcely to be believed that counsel, who so eloquently proclaim the virtue of their client, will care on his behalf, to interpose such a suggestion at this time.

And since the Court determines that the claim of the appellant is wanting in substantial merit, in the main, however it may be sustained by technical rules, it will hardly listen with patience to a technical objection urged by respondents to relief to which appellant is confessedly entitled.

The evidence is all in the record. It was admitted without [45] objection. The facts are all set out in the complaint. Some of them were unproven, the Court holds. But those upon which the alternative decree is asked are all admitted. By such a decree the Court says that the sale was not void, but by determining to effect the purchase in the way it was made, John M. Smith made himself liable for interest on the funds used by him and for the entire time he used them.

One of the purposes of the action was to annul the settlement made with appellant and to have the sale adjudged void because of the circumstances and conditions under which the stock was bought and paid for. The Court adjudicates, should it grant the alternative relief, that the settlement should be set aside, but that, in view of the circumstances under which the stock was bought and paid for, the further appropriate redress is an accounting for the

purchase money and interest from the time the guardian used it, that his use of it entitles the appellant not to overturn the sale, but to have interest at a proper rate and for the full period of its use.

It is true the relief now asked, should the Court eventually hold the sale to be valid, is not specifically prayed for in the complaint. But there is a prayer for general relief. Under this any appropriate decree may be awarded.

Merk vs. Bowery M. Co., 31 Mont. 308.

Indeed, the plaintiff in equity is entitled to any relief warranted by the facts, whatever his prayer may be.

State vs. Tooker, 18 Mont. 540.

Kleinschmidt vs. Steele, 15 Mont. 181.

Or though he had no prayer at all.

Custer County vs. Yellowstone County, 6 Mont. 39.

Even if amendment of the complaint in some particular might be desirable, the Court may permit the amendment or it [46] may, in its discretion, treat the pleading as having been amended.

1 Daniell's Chancery, page 418.

Fallon vs. Lawlor, 102 N. Y. 228.

Murray vs. Scribner, 43 N. W. 549.

Wilcox vs. Lasley, 20 Pac. 228.

Or if the Court finds any reason why that course should not be pursued, it may reverse with directions to the Court below to permit an amendment. This is often done when the Court finds that a demurrer was properly sustained or a nonsuit correctly granted, but it likewise appears that the plaintiff has

a cause of action if only his complaint contained the proper averments.

It is not at all uncommon for an appellate court, when the merits of a case appear to be with a complainant whose bill has been dismissed, to reverse the decree with directions to permit an amendment. Such a disposition was made of

Ruby vs. Atkinson, 71 Fed. 567.

The subject was considered and the practice vindicated in

Evans vs. Hughes, 54 N. W. 1049.

The opinion refers to many cases in which it was pursued. Most of these, perhaps, were appeals from orders sustaining demurrers, but judgment has been entered in the case of

Rigg vs. Parsons, 2 S. E. 81.

In that case the Court said:

“If nothing else appeared in the judgment and order of the court below, we would, notwithstanding the fact that its ruling was not erroneous in sustaining the demurrer, reverse the judgment, and remand the case, with leave to the plaintiff to amend his declaration if he elects to do so, since we can plainly see that it could be amended so as to avoid this ground of demurrer. Baylor vs. Baltimore & O. R. Co., 9 W. Va. 270; Norris vs. Lewen, 28 W. Va. 336.”

But the usual course was departed from because it appeared that the plaintiff had declined to amend. But even in such a [47] case the judgment was reversed with leave to amend in

Dist. of Columbia vs. Ball, 22 App. D. C. 543.

The Supreme Court of the United States has re-

peatedly acted in accordance with the procedure which it is insisted should be observed if the bill is believed to be defective, as is shown by the opinion in *Van Doren vs. Penn. R. Co.*, 93 Fed. 260.

In *Scruggs v. Endom*, 123 La. 887, the plaintiff was defeated because his testimony was excluded on an objection to the petition. The appellate court held that the objections urged were well taken, but refused notwithstanding to affirm the judgment and reversed it with directions to permit an amendment.

“If possible, the Court must not allow justice to be defeated and wrong to triumph, by a mere mistake or unskillfulness in pleading. A court of equity must always aim to act upon broad principles of justice, disengaged as much as possible from little technicalities.”

Ogden vs. Thornton, 30 N. J. Eq. 569-572.

We cannot help but think that the opinion of the Court, if it stands, operates as a proclamation to the effect that anyone may safely have himself appointed guardian of infant heir, borrow the money to buy their estate, and then use their funds to pay the notes given for the purchase price, provided only that he pays full value for the property. The inquiry as to value may carry the labors of the court back for a period of twenty years or more,—when most of those who knew best at the time of the sale of the value are dead and gone. The wards on arriving at their majority labor under an obvious disadvantage in an effort to get proof that would convict the guardian of actual wrongdoing, of any conscious purpose to do evil, of any attempt to overreach or defraud them. [48]

It seems not only an abhorrent invitation to guardians to use the trust funds in their hands in business ventures of their own, not to say speculation, but an invitation to anyone who has no scruples against so using funds to procure himself to be appointed guardian that he may thus utilize the funds of his wards.

Certainly the Court ought, if it approves a doctrine fraught with such imminent danger to the helpless, at least to add a deterrent qualification under which the guardian would find it no less expensive than if he had obtained the money elsewhere.

Coupled with sanction of a procedure by which the guardian charged himself with interest at three per cent annually, the lamentable evil of the Court's holding, it is impossible adequately to estimate.

[Excerpt from Respondent's Brief in Reply to Petition for Rehearing, in Smith vs. Smith, etc., in District Court of Meagher County, Montana.]

Also that part of respondent's brief in reply to the Petition for Rehearing which dealt with the matter of interest, as follows:

The third ground urged in the Petition for Rehearing is utterly without merit. The question involved is not before the court on this appeal. The matter was disposed of by this Court in the following language:

"It may be that upon the settlement of the guardian's accounts he should have been required to pay a greater rate of interest and for a longer period of time than was actually required of him, *but that question is not before us.*"

And how, we ask, could it possibly be before the Court in this proceeding? The foundation of plaintiff's action was and is the claim that the sale of the stock in question was fraudulent and void, and the purpose of the action was to disaffirm the sale. Utterly routed in their attempt to overturn the sale in question, counsel now ask the Court at this time to treat [49] their cause of action, disaffirming the sale, as one *affirming* the sale and to now grant appellant relief upon that theory.

Counsel, who would "blow hot and cold" in the same breath, declare, on page 126 of their brief, that appellant "does not claim such accounting specifically in his bill of complaint, because relief of that character proceeds upon the basis of *an affirmance of the sale*. He *could not make such specific claim and maintain his action.*" But his counsel do not hesitate to make it for him, which is the same thing, and without right, as we shall presently show.

The principle involved is thus stated:

"A party cannot, either in the course of litigation, or in dealings *in pais* occupy inconsistent positions, and where one has an election between several inconsistent causes of action he will be confined to that which he first adopts. Any decisive act of the party, done with knowledge of his rights and of the facts, determines his election and works an estoppel."

Bigelow on Estoppel (3d Ed.), pp. 562, 600, 603.

In Robb vs. Vas, 155 U. S. 43, the Supreme Court says:

“In *Conniham vs. Thompson*, 111 Mass. 270, at page 272, the court said: ‘The defense of waiver by election arises where the remedies are inconsistent; as where one action is founded on an affirmance and the other upon the disaffirmance of a voidable contract or sale of property. In such cases, any decisive act of affirmance or disaffirmance, if done with knowledge of the facts, *determines the legal rights of the parties, once for all*. The institution of a suit is such a decisive act; and if its maintenance necessarily involves an election to affirm or disaffirm a voidable contract or sale, or to rescind one, it is generally held to be a conclusive waiver of inconsistent rights, and thus to defeat any action subsequently brought thereon.’ ”

In *Conrow vs. Little*, 115 N. Y. 387, 394, the Court said:

“The contract between Branscom and the plaintiffs was, upon the discovery of Branscom’s fraud voidable at their election. As to him, the plaintiffs could affirm or rescind it. They could not do both, and there must be a time when their election should be considered final. With them that time was when they commenced an action for the sum due under the contract, and in the course of its persecution applied for and obtained an attachment against the property of Branscom as their debtor.”

See *Newell vs. Meyendorff*, 9 Mont. 254;

Thompson vs. Howard, 31 Mich. 309. [50]

Again, in any view of the case, if interest in any amount was due from John M. Smith, as guardian,

to the appellant, the claim for that interest was one which after his death must have been presented to the estate of John M. Smith before suit could be maintained thereon. (Respondent's Brief, pages 84-96.) And yet, counsel for appellant, in their petition for a rehearing, ask this court to disregard the statutes of the State, to reform their complaint and change the nature of their cause of action, to the end that, on rehearing, appellant may be granted relief to which, they admit, in their brief, he is not entitled.

Among the sections of the statute which would be utterly disregarded if such a course of action were pursued are Sections 7525, 7526, — 7530, 7532 and 7534, of the Revised Codes.

Also certified copy of Abstract from Probate Register, for the year 1900, of the District Court of Meagher County, State of Montana, to wit:

[Plaintiff's Exhibit No. 1—Abstract from Probate Register, in Re Estate of William Smith et al., in District Court of Meagher County, Montana.

No. 255.

In the Matter of the Estate and Guardianship of
WM. SMITH et al.,

Minors.

Date.

Memorandum of Papers.

Feb. 24, 1899. Petition for Appointment of Guardian.

“ “ “

Order Directing Notice of Application for Guardianship to be Given to Relatives of Minors.

| | |
|----------------|---|
| Feb. 24, 1899. | Affidavit of Posting Notice of Application for Letters of Guardianship. |
| Feb. 24, 1899. | Affidavit of Mailing Notices. |
| May 25, “ | Bond of Guardian and Oath. |
| “ 28 “ | Order Appointing Guardian. |
| June 15, “ | Order for Allowance for Care, Maintenance and Education of Wards. |
| Mch. 30, 1900. | Order Appointing Appraisers. |
| June 13, “ | Inventory. |
| “ 13, “ | Annual Account of Guardian. |
| “ 14 “ | Decree of Settlement of Acct. |
| Dec. 11, “ | Order Allowing Guardian to Use Money of Estate. [51] |
| Dec. 1, 1906. | Receipt of Anna Maud Smith. |
| “ 1, “ | Receipt of Nellie May Smith. |
| Dec. 1, “ | Final Account. |
| “ 1, “ | Pet. for Final Settlement, etc. |
| “ 1, “ | Order App’t Day of Settlement. |
| “ 1, “ | Aff. of Posting Notice. |
| “ 14, “ | Decree of Settlement Final Acct., etc. |
| “ “ “ | Decree of Final Discharge. |
| “ “ “ | “ “ “ “ |
| “ “ “ | “ “ “ “ |

Duly certified by the Clerk under the Seal of the Court.

Counsel for plaintiff introduced in evidence the following stipulation in this cause between the counsel for the respective parties, filed January 16, 1914:

Stipulation [Re Absences of John M. Smith and Mrs. Mary M. Smith from State of Montana, etc.].

IT IS HEREBY STIPULATED and AGREED by and between the parties hereto that the following statements regarding the absences of the late John M. Smith from the State of Montana or his presence in the State, as the case may be, and the absences of Mrs. Mary M. Smith, the above-named defendant, from the State of Montana and her presence therein, as the case may be, shall be taken as proof of these facts for all purposes in this case, and that no other evidence need be introduced regarding these matters.

IT IS STIPULATED and AGREED, That the late John M. Smith was absent from Montana during the whole of the month of December, 1906, and during eight months of the year 1907, and during the remaining four months of that year he was present in the State of Montana; that during the year 1908 he was present in the State of Montana two months and absent therefrom the rest of the time previous to his death;

That the defendant, Mrs. Mary M. Smith, was absent from [52] the State of Montana during the months of November and December, 1908; that during the year 1909 she was absent from the State of Montana during the months of January, February, March, April and October, November and December, to wit, seven months out of the twelve; that in the year 1910 she was absent from the State seven months out of the twelve; that in the year 1911 she was absent from the State of Montana seven months out of the twelve; that in the year 1912 she was ab-

sent the whole of the year; that she was absent from the State of Montana during the first five months of the year 1913, and part of the month of June, to wit, that she returned to the State in the month of June, 1913.

Signed in duplicate this 6 day of January, 1914.

[Excerpt from Testimony of John M. Smith from Reply Brief in Smith vs. Smith in District Court of Meagher County, Montana.]

In their reply brief in this cause, counsel for plaintiff referred to the testimony of John M. Smith on cross-examination, beginning on line 6, page 539, to line 20, page 540, of the record on appeal, in said court, in said case of Smith vs. Smith, as follows:

Witness spoke to Judge Armstrong about the matter of the use of the moneys by him; that as near as he can remember he asked Judge Armstrong for the privilege of borrowing the money. He didn't tell him that he had already used it, but wanted the privilege of using it at three per cent; when he had given security for it; had given his note, so that it was perfectly safe. That he referred to the Security Company when he said he had given security, and he meant that he gave them security by this security company for the amount of \$8,500, for saving and keeping the money for the heirs of William A. Smith. As near as witness could remember, the judge, in the conversation referred to above, said it was a large amount of money and that he, the judge, thought that the proposal was all right; [53] that it being safe and secure a large amount of money like that which was hard to place where it would all

be safe would be better loaned in bulk that way.

Counsel for plaintiff introduced in evidence the judgment-roll and the decision of the Circuit Court of Appeals for the 9th Circuit, in Cause No. 1830, Nellie Mae Moore, Appellant, vs. John M. Smith et al., Appellees; and as the same are of the records of said Court of Appeals, they are not set out herein, but may be referred to and considered as if set out in full herein.

[Testimony of William J. Smith, for Plaintiff.]

On the trial of this cause, plaintiff, WILLIAM J. SMITH, being called and sworn as a witness in his own behalf, testified in substance as follows:

That he is the complainant in this case; that he lives in Los Angeles, California; that he has lived there about a year; that he was living there in May, 1913; that he has lived in California since January, 1913; that he left Montana the latter part of January; that when he left he intended to make his home in California. That when he attained his majority he was in Missoula, Montana, going to school; that he had never up to that time, been engaged in business; that he had had no business experience; that he had never taken any course in commercial affairs, or any business college; that during his boyhood he had gone to school all his life; that the money paid to him by his uncle, John M. Smith, coming to him from the estate of his father, he received shortly after he became of age, in the year 1906; he received the money on the ranch of the Smith Bros. Sheep Company, in Meagher County, Montana; that his uncle was not there; that he dealt with N. B. Smith and

(Testimony of William J. Smith.)

Wallie Flatt; that N. B. Smith wrote him to come to White Sulphur Springs; that the witness went there and N. B. Smith [54] there told him the estate was already for final settlement, and wanted to know if the witness would look over the papers with him, which he did. That about all the witness could figure out was the expense account, what he had spend; that N. B. Smith explained to him that he was to get the same amount of interest that was allowed on Government bonds; that this is about all there was to it. That the witness looked over the expense accounts, checks that he had drawn, money that he had drawn; that N. B. Smith gave him stock in the Alice and Blackhawk mines, among others, and explained to the witness that he was not able to divide the lots in White Sulphur Springs, as it was an undivided third. Witness took it for granted that the account was all right, and let it go; that he was not in court; that he did not have any proceeding in court; that he did not consult a lawyer or have a lawyer with him; that N. B. Smith told the witness that he could get Black to go over this thing with him. But he said he didn't see it would be any use. The witness did not get Black. N. B. Smith told the witness he would have to see Wallie Flatt to get the check; witness went to Martinsdale, and Flatt gave him the check. A telephone call from his sister, Nellie Mae Mooré, first caused the witness to suspect the correctness of the amount, and of the dealings of his uncle in the matter of the estate; that it was after that the witness found out that this occurred. Wit-

(Testimony of William J. Smith.)

ness thinks this occurred some time in the early part of August, of the year 1907, he thinks; 1906 or 7; the witness is not positive which; that it was after he got his money; that it must have been after 1906; that it was in 1907.

Cross-examination.

Witness does not remember how early in August it was that he got word from his sister by telephone. He thinks it was [55] some time in August; that it is quite a while ago and the witness cannot remember exactly; witness cannot say how early it was in August; he would judge it was before the 15th of August. Witness remembers testifying in the case of Smith vs. Smith, in the District Court of Meagher County.

Q. I will ask you whether or not in that case you did not testify that you learned of what is alleged to be the fraud in the transaction some time in the Spring of 1907?

A. Well, I would consider that in the Spring.

Q. You would consider August in the Spring?

A. Yes. I didn't know that I said that, I don't remember.

The attention of the witness was directed to his testimony, given in the said case of Smith vs. Smith, wherein he testified that he has learned about the conditions of the sale from his sister, Nellie Mae Moore, who telephoned him from Helena to Missoula, where the witness then was, to come over to Helena; that the witness thought it was the same year that he received the money; that he thought it was in the year

(Testimony of William J. Smith.)

1907; that he didn't remember whether it was in the Fall or in the Spring; that it was in the Spring he thought, because it was good weather. And to his testimony on cross-examination in answer to the question, as to the year and the time of the year when he received this information, to which he answered that he was of the opinion that it was in the Spring; that it must have been in 1907, the witness was then asked if he testified that way. That the witness answered yes, and that he was saying the same thing yet; that prior to this telephone call he does not remember of having had any communication from his sister in reference to the matter; that he does not think that he had heard from Mr. T. J. Hoolan in reference to it; that he doesn't remember; that he cannot state positively whether he did or did not; that Hoolan was in Montana in the Spring of 1907, with [56] the witness believes, Mr. Moore, the husband of his sister. Witness did not meet them until they were here quite a while; does not believe he met them before he met his sister; cannot remember whether they had written him or not; that the witness was present at the time the testimony was taken before the examiner in the case of Nellie Mae Moore vs. John M. Smith; that in California the witness works as an automobile salesman and drives a machine; that he first went to California in January, 1913; that he worked for about two months for the Merchants' Mercantile Company; that he next went East on a business trip; that he was then located in Los Angeles. That prior

(Testimony of J. R. Wine.)

to going to California he had been in Montana about seven years; that in 1907 he was living in Missoula, and in 1908 in Helena; in 1909 and 1910 in Helena.

[Testimony of J. R. Wine, Jr., for Plaintiff.]

J. R. WINE, Jr., called and sworn as a witness on behalf of complainant, testified in substance, as follows:

That he was an attorney at law, employed in the office of Nolan & Scallon, attorneys for complainant; that as soon as this case was set down for hearing he procured the issuance of a subpoena for N. B. Smith, of White Sulphur Springs, and placed it in the hands of the United States Marshal, for service. That thereafter we decided to serve it by telegraph, so that Mr. Smith would have time to get here for the hearing, and for that purpose the witness and the Deputy United States Marshal communicated with the Sheriff of Meagher County by telephone. The Sheriff informed us that N. B. Smith was in Washington, and as far as he could learn would not return for some time. A copy of the subpoena had been prepared to be telegraphed to White Sulphur Springs, but after it was learned from the sheriff that Mr. Smith was not there, the subpoena was not telegraphed over. That the sheriff at the same time [57] agreed to send over an affidavit setting up these facts, which affidavit had not arrived at the time of the hearing. Witness advised the deputy marshal that he would pay the fees. The witness advanced the marshal the money for the same.

DEFENSE.

That on the trial of this cause, counsel for defendant offered in evidence the judgment-roll, contained in the printed Record on Appeal, to the Supreme Court of the State of Montana, in the case of William J. Smith, plaintiff and appellant, vs. Mary M. Smith, as executrix, et al., defendants and respondents, which judgment-roll is as follows:

[Judgment-roll in Smith vs. Smith, etc., in District Court of Meagher County, Montana.]

(Title of Court and Cause.)

Amended and Supplemental Complaint [in Smith vs. Smith, etc., in District Court of Meagher County, Montana].

Comes now the above-named plaintiff, and leave of Court being first obtained, files herein his amended and supplemental complaint, and for cause of action against the above-named defendants complains and alleges:

1. That the defendant Smith Bros. Sheep Company is a corporation organized and existing under the laws of the State of Montana, and having its principal place of business in the County of Meagher, in the State of Montana; that plaintiff is a son of the late William A. Smith; that the latter died on February 13, 1897, at White Sulphur Springs, in the State of Montana, and that at the time of his death the said William A. Smith was a resident of the State of Montana.

2. That the said William A. Smith left as his only heirs, his three minor children, of which the

plaintiff is one, and that the other children are Annie Maud, now the wife of L. D. Kahle, of Metamora, in the State of Ohio, and Nellie Mae, now the wife of William H. Moore, of St. Louis, Missouri; that at [58] the time of the death of his father, the plaintiff herein was of the age of eleven years, that his sister, Annie Maud, was of the age of ten years, and his sister, Nellie Mae, was of the age of nine years.

3. That the said William A. Smith left a will by which he devised and bequeathed all of his property to his said children share and share alike; that on or about the 5th day of April, 1897, the said will was admitted to probate in the District Court of what was then the Ninth Judicial District of the State of Montana, in and for the County of Meagher, and the defendant Napoleon B. Smith was appointed executor in pursuance of the provisions of said will; that on April 6, 1897, the said defendant Napoleon B. Smith qualified as such executor, and letters testamentary were then and there issued to him in said estate, as plaintiff alleges on his information and belief.

4. That on May 15, 1897, as plaintiff alleges on his information and belief, an inventory and appraisal of said estate was returned to the court by said executor; that amongst other property left by said deceased and forming a part of said estate and listed in said inventory were 122,950 shares of the Smith Bros. Sheep Company aforesaid.

5. That on January 12, 1898, as plaintiff alleges on his information and belief, the said executor filed in the said District Court his petition praying that he be allowed to sell the aforesaid shares of stock

in said company at private sale at a sum not less than \$75,000, and that the only reasons given by the said executor in his said petition for the sale of said property are set forth in said petition in the words and figures following, to wit:

“That the greater portion of the property of said estate consists of 122,950 shares of stock in the Smith Bros. Sheep Company, a corporation organized under the laws of the State of [59] Montana, for the purpose of growing, buying and selling of sheep, wool, horses and cattle, and the acquiring of lands and water rights for the purpose of carrying on said business; that the whole stock of said company consists of 250,000 shares, of which John M. Smith and Mary A. Smith, his wife, own more than one-half; that the said John M. Smith is 64 years of age and is in poor health, and that his wife is also in poor health, and both are desirous of selling their entire interest in said Smith Bros. Sheep Company, and stock thereof; that said Smith Bros. Sheep Company, corporation aforesaid, will expire by limitation in the year A. D. 1900; that the property of said company consists of lands, sheep, horses and cattle; that said John M. Smith is a brother of said deceased, and had been associated with him in business for the period of thirty years prior to February, 1897; that should the said John M. Smith and Mary Smith sell their interest in said stock, then the stock of the said estate would be greatly depreciated in value, and the same would be at the mercy of the majority stockholders; that by selling said stock at private sale, and in conjunction with the sale of the stock

by the said John M. Smith and Mary Smith, the same could be sold at a much greater price than in any other manner, and that the sheep business is in such condition that the same could be sold now at a good price and for an amount exceeding the appraised value thereof, to wit: \$61,475; that your petitioner is informed and believes that he can bond or sell the stock of said estate for a sum not less than seventy-five thousand dollars, in case the said John M. Smith and Mary Smith sell their stock at the same rate; that your petitioner believes this a rare opportunity to sell said stock at so large a price, and that it is for the best interest of said estate that said stock be sold at this time." [60]

That said petition was heard by the Judge of said court at chambers at Bozeman on January 24, 1898, and as plaintiff alleges on his information and belief, that the said executor then and there presented to said Judge in support of said petition and affidavit made by the defendant John M. Smith, which affidavit is in words and figures as follows, to wit:

"In the District Court of the Ninth Judicial District of the State of Montana, in and for the County of Meagher.

In the Matter of the Estate of WILLIAM ALONZO SMITH, Deceased.

State of Montana,
County of Meagher,—ss.

John M. Smith, being first duly sworn, deposes and says: That he was a brother of the deceased; that the stock of the Smith Bros. Sheep Company is

owned by affiant and his wife Mary A. Smith and the estate of said deceased; that affiant and his said wife own more than one-half of the stock of said company; that affiant and his said wife are both in poor health, and that his said wife is now away from the State of Montana for the purpose of benefiting her health by means of change of climate; that affiant is affected with asthma and catarrh and has been advised by physicians that he will have to seek a change of climate if he desires to be relieved from his ailments aforesaid; that it is the intention of affiant and his said wife to dispose of their stock and interest in said company as soon as they can dispose of the same for a fair cash value; that said company is a corporation organized under the laws of the State of Montana for purpose of engaging in sheep, cattle and horse business and the acquisition of lands and water rights to be used in said business; that the company is the owner of large tracts of land and some 35,000 head of sheep and other personal property used in said business; that the property of said company could be sold at this time as [61] affiant is informed and believes at a better price than at any other time, and that said stock of the estate could be sold at a greater price by being disposed of in connection with sale of the stock of affiant and his wife; that said corporation will expire by limitation in the year A. D. 1900; that it would be for the best interest of said estate that its stock be sold at private sale.

JOHN M. SMITH.

Subscribed and sworn to before me this 20th day of Jany., 1898.

N. B. SMITH,
Notary Public."

That no guardian of any kind was appointed to said children at or prior to said hearing and that no one appeared thereat on their behalf.

That the said affidavit was sworn to before the said Napoleon B. Smith as notary public; that said affidavit was made for the purpose of obtaining from the said Judge an order for the sale of said property; that on January 24, 1898, an order was made by the Judge of said court in pursuance of said petition and largely because of said affidavit made by the said John M. Smith, allowing the said executor to sell said shares of stock at private sale without notice.

That the said executor did not proceed to sell the said property until the following year, to wit; until on or about the 16th day of February, 1899; that on or about the said last-mentioned date the said Napoleon B. Smith, according to his return and account of sale on file in said matter sold or pretended to sell to the defendant John M. Smith the said shares for the sum of \$85,000, of which \$10,000 was to be paid down, and the remaining \$75,000 were to be paid when the Court approved the sale; that in said report, the said Napoleon B. [62] Smith recited that he had sold the said shares of stock at private sale without notice to said John M. Smith for the aforesaid sum, and that the said sum of \$10,000 had been paid on account; that on March 28, 1899, the said Court.

made an order confirming the said sale to the said John M. Smith; that the aforesaid balance of \$75,000 was not paid to the said executor until April 27, 1899, if paid at all; that the said pretended payments of \$10,000 and \$75,000, respectively, were not made with money, but in the manner as follows, to wit: That the said John M. Smith obtained credits at a bank in Helena, Montana, known as the Union Bank & Trust Company, for the said sums, by giving his personal notes therefor, and that he sent his checks for similar sums to the said N. B. Smith. That said John M. Smith was then in California and sent his checks from there, the first for \$10,000 in February, 1899, and the second for \$75,000 in April, 1899. That on or about the 10th day of February, 1899, said N. B. Smith obtained in exchange for the said check of \$10,000 a certificate of deposit from the said bank, for a similar sum. That on or about April 27th, 1899, said N. B. Smith turned in to this said bank, the said certificate of deposit, and the said check of John M. Smith for \$75,000, and in exchange therefor, obtained a certificate of deposit for \$80,000 to his credit as executor and an open account credit for \$5,000 to his personal order.

That on June 14th, 1899, the said N. B. Smith, having previously obtained his discharge as administrator endorsed and turned over to the said John M. Smith, who had meanwhile been appointed guardian of the plaintiff as aforesaid and of his sisters, the said certificate of deposit and gave him his (N. B. Smith's) check on said bank for \$2,174.20.

That within three (3) days thereafter, the said John M. Smith endorsed and turned in to the said bank, the said certificate [63] of deposit of \$80,000 and the said check of N. B. Smith, for \$2,174.20 in part payment of the notes which said John Smith had given to the said bank as aforesaid, and then or later, paid the balance of the said notes and the interest thereon with moneys obtained from said Smith Bros. Sheep Company.

That prior to the consummation of said sale, to wit, on or about the 24th day of February, 1899, the said John M. Smith filed in said Court his petition in writing, praying for his own appointment as guardian of the person and property of plaintiff and the other children and heirs of the said William A. Smith; that said petition was duly heard by said Court on the 28th day of March, 1899; that said Court then and there duly appointed the said John M. Smith guardian of the persons and property of the plaintiff and his two sisters; that the said defendant John M. Smith thereafter duly qualified as such guardian and acted as such until the respective majorities of the said children.

That on June 14, 1899, a decree of settlement and distribution of the said estate was made and entered by the said Court; that by said decree, the property of said estate was distributed to this plaintiff and his said two sisters in the proportion of one-third to each; that on the said day the said executor received his final discharge, and that on the said day the said defendant John M. Smith gave his receipt as guardian of the said children to the said Napoleon B. Smith

for such property as said executor then had in his hands belonging to said estate, and that thereby the said John M. Smith gained possession of all of the property of the said plaintiff and his two sisters.

6. That in August, 1899, the term of the existence of said corporation was extended for ten years from April 19, 1900, as plaintiff alleges on information and belief. [64]

7. The plaintiff further alleges and charges on information and belief that the alleged sale of said 122,950 shares of the capital stock of the said Smith Bros. Sheep Company was illegal and fraudulent and that it was collusive; that the said John M. Smith was without the right to purchase said property; that his duty as guardian, *quasi* guardian or applicant for guardianship, was incompatible with the purchase by him of said property; that prior to his actual appointment John M. Smith stood in the position of a *quasi* guardian; that more than one year had elapsed from the date of the making of the order of sale thereof; that no re-appraisement of this property was had; that said John M. Smith had by his affidavit and otherwise procured or aided in procuring the making of the order of sale; that he was the president of the said company had been for many years a partner of William A. Smith in business, and stood at that time in the place of a parent to said children; that meanwhile, as plaintiff alleges on information and belief, the said John M. Smith had decided to retain his stock in the said company and to continue the business thereof, and did in fact do so; that the business and property of said company had greatly improved

during the said year, and that the business in which it was engaged was, at the time of the sale, increasing in prosperity and in value, and that the property of the said company was also steadily increasing in value; that the reasons given in the petition of the said executor and in the affidavit of the said John M. Smith for the sale of the said property had most of them ceased to exist, and that all had lost their force, if they ever had any.

That said John M. Smith procured his appointment of guardian of the plaintiff and his sisters, with the intention and for the purpose of getting back into his possession, any moneys, or whatever else he, the said John M. Smith, might have paid [65] or pretended to pay to the said executor for said stock, and with the intention and design of using the same to pay off and discharge the liabilities incurred or to be incurred by him, to the said bank as above alleged.

That the procurement of his appointment as such guardian, and the use of such certificate of deposit, and of the said check in payment of his said notes, were a part of a plan conceived prior to the purchase of said stock by the said John M. Smith, and that he relied upon the success of that plan in making the alleged purchase and in dealing with the said bank as aforesaid, and that the funds or credits which he expected to get back into his possession as guardian were relied upon by him as the means of enabling him to make such purchases.

That it was then and there to the interest of the said children and of the said estate of the said William A. Smith to retain the ownership of the said

shares of stock, notwithstanding all these considerations, the said Napoleon B. Smith and the said John M. Smith colluded and confederated as plaintiff alleges on information and belief, to secure the said property to the said John M. Smith, and to sell the same to him at much less than its real value, and that in pursuance of this collusion, the said Napoleon B. Smith proceeded to make the alleged sale to the said John M. Smith, and to obtain confirmation thereof, and delivered said shares to him, and the latter to enter into the alleged contract of purchase heretofore set out; that the value of the said shares of stock so sold to the said John M. Smith was very much in excess of the price paid therefor, and that the price was greatly disproportionate to the real value thereof; that the said Napoleon B. Smith had full knowledge of the petition of said John M. Smith for his own appointment as guardian and of the appointment of the said John M. Smith as guardian; that the said Napoleon B. [66] Smith is a nephew of the said John M. Smith and was at the time in question herein his attorney and connected with his business, and the said John M. Smith was one of the sureties on the bond of the said Napoleon B. Smith as the executor of the estate of William A. Smith; that by means of his appointment as guardian and within less than two months after the day mentioned in the accounts of Napoleon B. Smith as that of the receipt of the \$75,000 from the said John M. Smith, as the balance of the purchase price, the said John M. Smith came into possession of all the moneys and property of the said estate and of the very moneys

which he was supposed to have paid to the estate of William A. Smith; that later, to wit, on or about the 11th day of December, 1900, the said John W. Smith procured from the said District Court an order authorizing him to borrow from the funds in his hands belonging to the said minors, to wit, the sum of \$82,000 according to the statements in said order, at the rate of three per cent per annum. That the estate of the said John M. Smith is still the holder of the aforesaid shares of stock of the said corporation; that the same are now of great value; that the rate of interest charged by banks and other money lenders was at the times in question not less than eight per cent, and that the said John M. Smith had to pay that rate or more on moneys borrowed.

8. That the plaintiff did not become of age until the 10th day of October, 1906; that during most of the time that has elapsed since the date of his father's death and prior to the commencement of this suit plaintiff has resided out of or was absent from the State of Montana; that prior to the year 1905 he had made a couple of visits to Montana during the summer, but only one of these visits was in the county of Meagher aforesaid; that in the year 1905 plaintiff went to Missoula to attend the State University, and lived there till after the [67] commencement of this suit, that the plaintiff had no knowledge of the fraud practiced upon him as aforesaid until the discovery thereof by him, and that such discovery was made within the last thirty days preceding the commencement of this suit and that this suit was begun on the — of —, 1907.

9. That the plaintiff is ready and willing to restore to the said estate of John M. Smith everything of value which the said plaintiff has received from the said John M. Smith under or on account of the said stock, and hereby offers to restore the same to the said estate of John M. Smith and to do any other thing that may be necessary or proper to replace the said estate of John M. Smith in the position which John M. Smith was in at and prior to the time of the alleged purchase by him of the said stock, and everything else that equity may require.

10. That at Battle Creek, in the State of Michigan, on the 12th day of September, 1907, this plaintiff personally rescinded the said transaction, and sale, of the said stock, and then and there offered to restore to the said John M. Smith the plaintiff's share, to wit, \$28,333.34, with interest and demanded of the said John M. Smith that the latter transfer to the said plaintiff one-third of the said shares, to wit, 40,983 $\frac{1}{3}$ shares, of the capital stock of the said company, but that the said John M. Smith then and there positively refused to do so, and in any manner to comply with said demand.

11. That at the time of his death the said John M. Smith, as plaintiff alleges on his information and belief, owned most of the shares of the capital stock of the said Smith Bros. Sheep Company; that he was the president thereof and controlled the said company, and that nothing could be done by it without his sanction; that the said company has made and accumulated [68] very large profits and that the said John M. Smith has received on account of said

shares very large profits, the exact amount of which is unknown to plaintiff, and cannot be ascertained by him except by means of an accounting and that the aforesaid shares of stock have been transferred on the books of said company to the said John M. Smith, and now stand in his name.

12. That the plaintiff has no adequate remedy at law in the premises.

And the plaintiff further alleges on his information and belief:

13. That on or about the 6th day of October, 1908, the said John M. Smith departed this life, leaving a last will and testament, and that in said last will and testament the defendant Mary M. Smith was named as executrix; that thereafter, to wit, on the 17th day of November, 1908, the said Mary M. Smith was duly appointed the Executrix of said last will and testament of said deceased. That thereafter, and before her substitution in this case, she duly qualified as such executrix, and ever since has been and now is the duly appointed, qualified and acting executrix of said last will and testament.

That on or about the 18th day of December, 1908, in pursuance of an order duly made by this court, the said Mary M. Smith, as such executrix, caused to be published in a newspaper published in the said county of Meagher a notice to the creditors of the said John M. Smith, deceased, requiring them to exhibit their claims within ten months, as provided by law, and that thereafter, to wit, on the — day of April, 1909, and within ten months from the publication of said notice, the above-named plaintiff duly

presented and exhibited his claim in writing for and on account of the matters set forth in this complaint, as required by said notice, to wit, at the office of Napoleon B. Smith, in the town of White Sulphur Springs in the [69] said County of Meagher; that said office was designated in said notice as the office of said executrix as the place where such claim should be presented. That the said executrix was not then present, and that said claim was then duly left at said office for her, with, and in the care of, the said Napoleon B. Smith. That the said claim was supported by an affidavit of said plaintiff and claimant, and the said claim and the amount thereof was justly due, that no payments have been made thereon, and that there were no offsets to the same to the knowledge of said affiant; and that full particulars of the said claim, as set forth in his complaint, were given and set forth in the said claim and statement thereof. That the said Mary M. Smith, as plaintiff alleges on this information and belief, was then absent from the county of Meagher. That said claim was neither allowed nor rejected within ten days from and after the presentation thereof, and after the expiration of said ten days, to wit, on or about the 2d day of June, 1909, an order was duly made and entered in this court and in this case substituting the said Mary M. Smith as such executrix in this case in place of the said John M. Smith, deceased. That she has appeared herein, and is now a defendant in this case.

Wherefore, plaintiff prays judgment and decree of this Court that the plaintiff is, and was at all times

in question herein, the beneficial owner of 40,983 $\frac{1}{3}$ shares of the capital stock of the Smith Bros. Sheep Company, to wit, one third of the shares pretended to be purchased by the said John M. Smith as aforesaid, and all the profits, dividends and increments thereof and which have accrued thereon; that the said Mary M. Smith as the executrix of the will of said John M. Smith be called fully to account to the plaintiff for all such profits, dividends and increments, and to transfer and deliver to the plaintiff 40,983 $\frac{1}{3}$ shares of stock of the said corporation [70] free from all claims, liens or encumbrances, upon this plaintiff restoring to said defendant everything of value which she has received from the latter on account of said transactions that said corporation be called on to render an account and statement to the plaintiff together with the said Mary M. Smith for the operations of said company, and prohibited from allowing the transfer to any other person by the said Mary M. Smith of any larger number of shares of the capital stock of said company than that which would remain in her name or under her control after deducting 40,983 $\frac{1}{3}$ shares therefrom; and that if the said Mary M. Smith shall fail to deliver said shares of stock to the plaintiff that such a transfer be made by a commissioner of this court, and that an equivalent number of shares standing in her name or the name of John M. Smith be cancelled on the books of the company, and that the said corporation be ordered to make such cancellation and such transfer to the plaintiff; and that the said Mary M. Smith be enjoined pending this suit from

assigning, transferring or otherwise disposing of any larger number of shares of the stock of said company than will allow to remain in her name or under her control above the number of shares claimed by plaintiff, to wit, 40,983 $\frac{1}{3}$; and for such other and further relief as may be just and equitable.

WILLIAM SCALLON, and

T. J. HOOLAN,

Attorneys for Plaintiff.

(Title of Court and Case.)

Answer [in Smith vs. Smith, etc., in District Court of Meagher County, Montana].

Come now the defendants above named and for answer to the amended and supplemental complaint, heretofore filed in said cause. [71]

1. Admit all the allegations contained in paragraphs 1, 2, 3 and 4 of said complaint, except that the inventory and appraisement referred to in paragraph 4 of said complaint was returned to said court on May 5, 1897, and not on May 15, as alleged in said paragraph.

2. Defendants admit all of paragraph 5 of said amended complaint down to and including the words "notary public" in line 20, page 6 of said amended complaint; defendants admit that said affidavit of John M. Smith, referred to in said paragraph 5, was made for the purpose of being used to support an application to obtain an order to sell said stock; defendants admit that on January 24, 1898, an order was made by the Judge of said court allowing the said executor to sell said shares of stock at private sale,

without notice, but defendants deny that said order was made largely because of said affidavit made by the said John M. Smith; defendants deny that said executor did not proceed to sell the said property until on or about the 16th day of February, 1899, but defendants allege the truth to be that said sale was made by said executor to said John M. Smith prior to the 16th day of January, 1899; defendants allege that said sale of said stock was made by said executor to said John M. Smith for the sum of \$85,000.00, of which sum \$10,000 was paid to said executor by said John M. Smith on or about the 8th day of February, 1899, and that the balance of said sum, to wit: the sum of \$75,000.00 was paid by said John M. Smith to said executor on the 27th day of April, 1899; admit that in said report of said sale said executor recited that he had sold the said shares of stock at private sale to said John M. Smith for said sum of \$85,000.00, and that of said sum \$10,000 had been paid on account, defendants admit that on March 28, 1899 said Court made an order confirming the said sale to said [72] John M. Smith; defendants deny that said sale was a pretended sale; but on the contrary allege that said sale was made in good faith by the parties thereto and that the price paid by said John M. Smith for said stock was a price in excess of the then value of said stock.

3. Defendants admit that on June 14, 1899, said executor, Napoleon B. Smith, having on that day obtained his discharge as executor of the estate of William A. Smith, did on said day turn over to said John M. Smith, who had theretofore been appointed

guardian of the plaintiff and of the other children of William A. Smith, all the money and property of the said estate of said William A. Smith which he then held in his hands, and that at the same time said N. B. Smith took from said John M. Smith, his receipt as guardian for said property and the whole thereof; defendants admit that said John M. Smith on June 17, 1899, applied all the moneys received from said executor, as far as they went, toward the payment of his said notes for \$10,000.00 and for \$75,000.-00 in said Union Bank & Trust Company and that he gave a new note for the balance and interest.

4. Defendants admit that on or about the 24th day of February, 1899, said John M. Smith filed in said court his petition in writing praying for his own appointment as guardian of the persons and property of said plaintiff and the other children of said William A. Smith; that said petition was duly heard by said Court on the 28th day of March, 1899; that said Court then and there duly appointed the said John M. Smith guardian of the persons and property of the plaintiff and his two sisters; that said John M. Smith thereafter duly qualified as such guardian and acted as such until the respective majorities of the said children; that on June 14, 1899, a decree of settlement and distribution of the said estate was made and [73] entered by the said Court; that by said decree the property of said estate was distributed to this plaintiff and his said two sisters in the proportion of one-third to each; that on said day the said executor received his final discharge; that on said day the said defendant, John

M. Smith, gave his receipt as guardian of the said children to the said Napoleon B. Smith for such property as said executor then had in his hands belonging to the estate; defendants deny that said petition for the appointment of guardian was filed prior to the consummation of said sale; defendants deny that said property of said estate came into the hands of said John M. Smith otherwise than as guardian, or that he obtained or held said property otherwise than as guardian of said children.

5. Defendants deny each and every allegation in paragraph 7 of said complaint down to and including the word "thereof" in line 14 of page 12 of said complaint; defendants admit that said Napoleon B. Smith had full knowledge of the petition of John M. Smith for his appointment as guardian and of the appointment of said John M. Smith as guardian; that said Napoleon E. Smith was a nephew of said John M. Smith; that said John M. Smith was one of the sureties on the bond of said Napoleon B. Smith as the executor of the estate of William A. Smith; defendants admit that on or about the 11th day of December, 1900, said John M. Smith obtained from said District Court an order authorizing him to borrow from the funds in his hands, belonging to the said minors, the sum of \$82,000.00 at the rate of three per cent per annum; that the estate of John M. Smith is still the holder of the shares of stock of said corporation so purchased from said executor, N. B. Smith, and that the same are of value.

6. On information and belief defendants deny

each and [74] every allegation contained in paragraph 8 of said amended complaint.

7. Defendants admit the allegations contained in paragraph 10 of said amended complaint.

8. Defendants admit that at the time of his death John M. Smith owned most of the shares of the capital stock of said Smith Bros. Sheep Company; that he was the president thereof and that the afore-said shares of stock have been transferred on the books of said company to said John M. Smith and that they stood in his name at the time of his death and now stand in his name.

9. Defendants admit the allegations contained in paragraph 13 of said amended complaint down to the word "law" in line 16 thereof.

10. Defendants deny each and every allegation in said amended complaint contained not herein expressly admitted or denied.

WHEREFORE, defendants, having fully answered said amended complaint, pray that plaintiff take nothing by his said complaint and that defendants have judgment for their costs herein expended.

WORD & WORD,

Attorneys for Defendants.

(Duly verified.)

Filed June 7, 1911.

(Title of Court and Case.)

Finding of the Court.

This cause came on for trial on the 26th day of June, 1911, on the pleadings herein and the stipulation of the parties hereto, said cause was tried by

the court sitting without a jury. T. J. Walsh, Esq., and T. J. Hoolan, Esq., appeared for the plaintiff, and R. Lee Word, Esq., appeared for the defendants. [75] After hearing the testimony and argument of counsel, the Judge, who tried said cause having fully considered said cause and the testimony therein, makes the following findings of fact and conclusions of law :

Findings of Fact [in Smith vs. Smith, etc., in District Court of Meagher County, Montana].

1.

In 1878 John M. Smith, then 44 years old, and W. A. Smith, then 34 years old, started in the sheep business in Meagher County, Montana, on a portion of the land which now belongs to the Smith Bros. Sheep Company.

2.

For years and until 1888 they were their own foremen and did most of the work. Until J. M. Smith married they kept no books, had no settlements and owned a common bank account on which both drew as they needed funds.

3.

W. A. Smith married in 1884, had three children, one boy and two girls, all born on the ranch where the family lived until 1890, when they moved to Castle (Smith's Camp), from which place, during W. A. Smith's absence in 1891, the mother went away taking her two little girls with her and leaving the boy in the care of a neighbor.

4.

John M. Smith married in 1887 and lived on the

ranch until the year after W. A. Smith's death, when in November, 1898, he went to California for the winter and every year thereafter, up to the time of his death, in October, 1908, spent over half of each year in California. He was a constant sufferer from asthma from 1895.

5.

In the fall of 1891 Wm. A. Smith took his boy to his sister, Mrs. Reynolds, then and now living in Fayette, Ohio, [76] and gave him into her keeping to bring up as a member of her family. In 1893, having gotten possession of his two girls, he placed them also with Mrs. Reynolds for the same purpose and all three of the children grew up in her family and were with her in Ohio at the time of their father's death. From the time they were placed with Mrs. Reynolds she was as a parent to these children.

6.

The Smith Bros. Sheep Company was formed in 1890 to take over the property and conduct the business of the two brothers. It was capitalized at 250,000 shares of \$1.00 each. Of the capital stock 5,000 shares were issued to the wives of the brothers for joining in the deeds; 100 shares were issued to J. A. McNaught, a brother in law, who was their bookkeeper from 1888 until 1901, and the balance of the stock was divided equally between the Smith Bros., 119,950 shares to each. John M. Smith's wife retained her stock. Wm. A. Smith's wife disposed of all of hers; William A. Smith finally getting 3,000 shares of it and John M. Smith 2,000 shares. During Wm. A. Smith's life he was vice-

president of the company, being succeeded after his death by N. B. Smith, who then had 50 shares of stock. John M. Smith was president of the company from the time it was formed until his death.

7.

John M. and W. A. Smith managed the outside business, but neither of them knew anything about the books. These were kept by McNaught until he left the employ of the company, January 7, 1901. From that date on W. W. Flatt kept the books. At the time of this change John W. Smith was in California. Flatt was not a bookkeeper and his entries were a mere memoranda. [77]

8.

From 1896 forward the company had about 150 range cattle, 10 milk cows, 30 head of work horses, 15 head of range horses, and 8 to 10 hogs. Aside from this its property consisted of sheep, of which it ran about 35,000 each year, and the ranch and improvements. By actual count there were 38,677 head of sheep on the ranch in March, 1899, which was excessive; the separate shearing account in July of the same year gave 38,339 head.

9.

The ranch consisted of titled lands and improvements and contract interests in railroad lands. Of the former or titled lands there were 14,818.8 acres of which all but 1920.42 acres (which lay in Park County) were in Meagher County, as was all of the personal property. The titled lands in Meagher County classified about 475 acres of first class farming and meadow lands; 298 acres of second class

farming and meadow lands; 6,827.14 acres of first class grazing lands (being lands that had some water on them), and 5,133.79 acres of second class grazing lands. The 1920 acres in Park were first class grazing lands. There were ditches with a capacity of covering 811 acres, but not over 300 acres had ever been plowed and not over 120 acres of said land had ever been in crops.

10.

The railroad lands were held on long time deferred payment contracts of sale at from \$1.25 to \$1.50 per acre all over the country, and the general custom in the buying and selling of such property and plants was to separately value the titled lands and then add the actual amounts paid down on the railroad contracts to cover the value of the contract interests.

11.

The improvements consisting of ditches, fencing, building and sheds, were of the kind usually found on a sheep ranch [78] and in selling or buying were usually included in the entire value as fixed by the price per acre, which also generally included farming machinery and work horses.

12.

The uncontradicted opinion of some of the best business men in Meagher County, men who had had a wide experience in the sheep business and who had known the Smith Bros.' ranch for many years, was that the Smith Bros.' ranch in January, 1899, would, as a whole, be fairly valued at \$2.50 per acre including the improvements and machinery, to which amount was to be added the amount paid in in the

purchase price on the railroad contracts.

13.

A property similar to that of the Smith Bros. Sheep Company containing 13,000 acres with all improvements, situated about ten miles from the Smith Bros. ranch sold in 1902 for \$2.50 per acre; while in 1906 a similar plant situated at Martinsdale, very near the ranch of the Smith Bros. Sheep Company and containing 17,000 acres sold for \$2.65 per acre, all improvements included.

14.

These same experienced business men and sheep men also testified that a fair price for the sheep of the Smith Bros. Sheep Co., in January, 1899, taken as a whole, would have been \$2.50 a head.

15.

On February 13, 1897, William A. Smith died at White Sulphur Springs, Montana, at the age of 53. Wm. A. Smith in his will named N. B. Smith as his executor, who was appointed and qualified April 5, 1897. Wm. A. Smith left practically no cash, only \$470.72 in money coming into the executor's hands, [79]

16.

The inventory of the estate of Wm. A. Smith was filed in May, 1897. The valuation of the 122,950 shares of the stock of said company, owned by Wm. A. Smith, at the time of his death, was made by experienced sheep men conversant with the property and the business of the company and placed by them at \$61,475.00.

17.

John M. Smith was greatly affected by his broth-

er's death. He was then 63 years old in poor health as was his wife, who was then absent and who wished to go to California to live. McNaught conceived the idea of trying to sell the property. McNaught and Mr. John M. Smith, after discussing the matter of sale with John M. Smith, suggested the idea of a sale to the executor.

18.

From the time the idea of selling was suggested to him, N. B. Smith, the executor, gave it serious consideration; he took frequent counsel with experienced sheep men, who themselves were familiar with the property of the Smith Bros. Sheep Company, as to the advisability of holding on or selling, and if he sold, the price he ought to get for the stock of the estate. Messrs. Moore and Anderson, two of the gentlemen with whom the executor conferred, both say they advised him to sell at a price of \$80,000 for the estate stock.

19.

From the beginning John M. Smith had a higher idea of the value of the property than did the executor and the disinterested business men whom the executor consulted. The executor and John M. Smith, differed radically about the price of the property during all the negotiations for its sale. [80]

20.

The first option on the whole property ran to McNaught, who was trying to effect a sale of the property through Henry Klein, of Gans & Klein. The option price was \$220,000. The executor considered this price too high, so high in fact, as to for-

bid a sale. No sale was effected under this option.

21.

On January 14, 1898, a petition of the sale of the estate stock was filed, supported by affidavits. The petition named as a minimum price for the stock \$75,000, but the executor meant to get all he could for it. John M. Smith did not wish to sell out and leave the children's interest unsold. Both John M. Smith and the executor believed that the stock of the estate of the children would bring more if it were sold in conjunction with that of John M. Smith. On January 24, 1898, the court authorized a sale of the estate stock at not less than \$75,000.

22.

On March 25, 1898, the executor, in answer to a letter from John M. Smith, asking what he, the executor, would be willing to take as the least price of the stock of the estate in the event of a sale of the whole property, wrote John M. Smith as follows:

White Sulphur Springs Montana,
March 27th, 1898.

Dear Uncle:—

Your letter in regard to the stock of the estate came to hand. I have been thinking over the matter. I think rather than see a sale go by I would be willing to take EIGHTY FIVE THOUSAND DOLLARS for the stock. I want to see a sale go through in some shape, but at the same time I want to do the best I can for the estate. I would want the EIGHTY FIVE [81] THOUSAND DOLLARS alone for the stock, and the party who gets the stock

to pay all the debts of the company, and also that the sheep company cancel whatever debts it might have against the Alice or Black Hawk Mining Companies.

Yours truly,

N. B. SMITH.

The executor would not make any fixed price but always insisted on getting his *pro rata* of any sale if a sale of the whole plant was made.

23.

In June, 1898, McNaught was given a new option on the whole plant at a reduced price of \$190,000. In this option, while the seller was to keep the wool, he was to bear the expenses of the preceding year.

24.

On July 4, 1898, C. B. Power, after going over the ranch in company with McNaught and Henry Neill, seeing the property and the books, proposed to take an option for fifty days on the entire property on a basis of \$200,000 for the property, on the express condition, however, that he should have the wool clip, just being sheared, which sold for \$42,184.87, the same to be applied as a credit on the purchase price on the property to be finally taken under the option; and upon the further condition that the company pay the amounts payable during the year on all railroad land contracts. This amount was \$3,003.86. This made the real proposed option price on the whole property \$154,811.27. John M. Smith declined this proposal for an option.

25.

On August 16, 1898, John M. Smith wrote the executor from Chicago a letter in which he said,

speaking of the Power offer: [82]

“I do not think I am under any obligations to hold for them any longer. They did not accept my offer but made an offer that would not have let us out with \$80,000 each if we would accept it, so I have other parties at work that I think will make a deal that will be satisfactory to us all. I will do my level best to bring it about as early as possible. I will pay as suggested beginning the first of September.”

The statement, “I will pay as I suggested beginning the first of September,” referred to the \$200 per month payment to the executor for the privilege of selling the estate’s stock with his own at a *pro rata* price. On August 10, 1898, J. M. Smith paid \$600 on this selling privilege to the executor. This *pro rata* price N. B. Smith, as executor, always insisted on.

26.

In October, 1898, Tower & Collins, of Miles City, Montana, real estate brokers, advertised the property of the Smith Bros. Sheep Company for sale in newspapers for \$200,000 in cash without result.

27.

On November 29th, John M. Smith wrote to the executor from California, as follows:

Pasadena, Cal., Nov. 29.

N. B. Smith,

Dear Nephew:

I received your letter. I was glad to hear that you had a good time at the fair it was such a treat to meet your mother. I had a letter from Miles. He thinks he will make the deal. He asked until the

20th of next month to close it he seemed quite sure about it. I gave him the time asked for. If he don't make it by the 1st of January I will change it. I am quite sure we will make it this spring I will write you again. Mrs. Reynolds has a scheme I referred her to you as I said you had to be [83] governed by the court. Good Bye.

J. M. SMITH.

P. S. We have pleasant weather all the time here now it is at the health resort.

Mrs. Reynolds' "scheme" referred to was an expressed desire by her to get an advance payment for the care of the children (in the event the property was sold) to the extent of \$20,000.00.

28.

December 30, 1898, Henry Neill at White Sulphur Springs made the executor an offer of \$80,000 cash for the estate's stock. He would not have offered a larger price in March, 1899. The executor told him that John M. Smith had been given an option on the stock that he might sell it with his own and had paid \$600.00 thereon; that he would write John M. Smith to see if he wanted to continue it, and if not, would treat with Neill.

This was the only offer that ever was made for the estate's stock. The only other offer, the Power offer, being for an option and made on the whole property.

29.

On December 31, 1898, the day after the Neill offer, N. B. Smith wrote John M. Smith as follows:

White Sulphur Springs, Montana,
December 31, 1898.

Dear Uncle:—

Neill of Helena was in to see me yesterday in regard to the ranch property. He wanted an option on my interest.

I told him I could not give it at this time as I had let you have an option. If you are figuring on Miles making a trade, I think you had better look for other parties. [84] Neill thinks he can sell the property. I am very anxious to do something with the property as I feel that the estate is going to lose money by holding it. Heitman and Danzer have a large number of sheep feeding in east and it is the prevailing opinion of those who know that they will lose from 50 cents to a dollar a head on the transaction. Neill said he would make me a cash offer of \$80,000.00 for the estate's interest in the property. If you will make me a cash offer of \$85,000.00 you can have the property. I told Neill I would not make such an offer. McNaught writes me that you now owe the company \$13,839.35, and that the company will have to commence borrowing money. If you do not take the stock it would be your duty to put your note into the company for the amount so that the company could raise the money on the same to carry on the business. Under our law the only way money can be drawn out of a company by a stockholder is by declaring so much dividend on each share of stock. I do not make the suggestion to hurt your feelings, but you know yourself that such large transaction should not be carried on in such a loose way. Please

let me hear from you in the matter. We are all well. I wish you all a happy new year. I got a letter from Barnes at your place. Give all the Montana people my best regards.

Your Nephew.

This was the first time the idea of J. M. Smith buying the estate stock was ever suggested.

30.

J. M. Smith declined the offered rebate of the \$400.00 option privilege money and later paid it and it went to the children. [85]

31.

Prior to the 14th day of January, 1899, John M. Smith wired N. B. Smith, the executor, that he would accept his offer contained in his letter of December 31, 1898.

32.

On January 14, 1899, J. M. Smith wrote the Union Bank & Trust Company as follows:

Pasadena, Cal., Jan. 14, 1899.

Mr. Horge L. Ramsey,

Helena, Montana:

Would your bank lone ninty thousand dollars to me & take the entire stock of the Smith Bros. Sheep Co., as security.

I consider it gilt edge I am about to pay the estates interest. I will only want it ontell I can make a sale of the property perhaps 4 or 5 minutes. Wire me your lowest rate of interest & if can get it wire at my expense all the company owes is the \$2,000—

that I sent the note for the other day.

Yues truly,
J. M. SMITH.

Before this letter reached Helena a second two thousand dollar note had been discounted and put to the company's credit in the Union Bank & Trust Company and in addition to this indebtedness there were wages due the employees of the company; the Flatt and Zoeller debts.

33.

On January 16, 1899, John M. Smith wrote N. B. Smith and said, among other things:

"I wired you that I would accept your offer for the stock of the Sheep Plant belonging to the children. I have not heard from Miles yet. If he makes a raise I will pay you the \$90,000, if he fails I will give you the \$85,000 that you ask." [86]

34.

On January 15, 1899, N. B. Smith wrote J. M. Smith as follows:

White Sulphur Springs, Mont.,
January 16, '99.

John M. Smith,
Pasadena, California.

Dear Uncle:—

Your telegram came to hand in which you said you would take the stock. I want a clear understanding with you so that there may be no hereafter in the matter. It is understood that I am to get eighty-five thousand dollars for the stock and the estate is to have that and not owe the company anything for

money advanced for uncle Bill's estate. Mack wrote me the other day about the four hundred dollars you were to pay, but I will make no claim as to that if you take the property at the above figures. You had better pay a portion down and then I will make the return to the court, I will want the remainder of the money. Please let me hear from you at once in the matter.

Yours truly,

N. B. SMITH.

35.

On January 20, 1899, N. B. Smith wrote Mrs. Reynolds as follows:

White Sulphur Springs, Mont.,
Jan. 20th, 1899.

Dear Aunt:—

Your favor of the 9th inst., came to hand. I will present the matter to the court and get his idea about the matter. I wish you had mentioned the matter before as the order now in force runs for one year from last December. I have made uncle John a proposition on the stock in the company, and that is \$85,000.00, cash down. He wrote me he would take it if he could borrow the money. I have talked with a number of good [87] business men about the proposition and all have advised me that I am doing the proper thing. The sheep business is to a great extent a gamble, and I think a good thing and a sure thing is the best. The money put down in Government bonds would keep and educate the children in fine style, and at the end of their time

of minority they would have a nice start in life.

36.

On January 21, 1899, the Union Bank & Trust Company wired John M. Smith, in response to his favor of the 14th instant, that the bank would make him a loan of \$90,000 at 9 per cent interest, on the same day they wrote him to the same effect.

37.

On January 22, 1899, J. M. Smith wrote N. B. Smith from Pasadena, California, and in his letter, among other things, he said:

“I will now ask you the amount you wish me to pay down on the property and what interest you want on the balance. I will take the estates stock at the \$85,000 and no claim on the estate for any money advanced it at any time. Tell me the least you will take as a down payment and what time you will give on the balance and what interest until paid, and you hold all the property as security. I made you a proposition in my last but don't know how it will suit you. Please give me your best terms as soon as you get this and I will arrange to meet it on the \$85,000 basis.”

38.

On January 24th, 1899, N. B. Smith wrote J. M. Smith as follows:

White Sulphur Springs, Mont.,

Jan. 24, 1899. [88]

J. M. Smith,

Pasadena, California.

Dear Uncle:—

Your letter of the 16th of Jan. came to hand. I

cannot sell the way you indicated. The only way I can sell is for cash down. If you are appointed guardian of the children then I could turn the money over to you. As I told you all the time I have no right to sell on credit. You had better forward me a draft for ten thousand and then I will file the petition, and on the approval of sale by the court the balance can be paid. The offer that I had was a cash down offer. If you but (buy) the stock the company can run on just the same and I can act as one of the trustees as I have some stock in my own name. Give my love to all.

Yours, etc.,

39.

On January 27, 1899, J. M. Smith wrote the executor from Pasadena, Cal. In his letter he said:

"I received yours of the 20th and I think your plan good. I will take steps to get the \$10,000 down payment and will proceed to business at once. I will write to the bank and arrange for the money. If you have me appointed guardian for the children, as soon as I sell I *won* to invest in gov. bonds all their money and also my own, as I do not intend to try to do any business after I sell out, and I fully intend to let go this spring."

40.

On January 27, 1899, J. M. Smith wrote George L. Ramsey, saying that he had heard from the administrator; that he was [89] now in shape to use \$10,000 of the money at once; that he wished to loan for six months with the privilege of paying it

at any time he could before it was due; that he wanted the money to make a payment on the estate of his brother; that the money would be turned over to the administrator, N. B. Smith; that if Ramsey would make a note for \$10,000 he would sign and return it; that he would turn it over to the administrator and close the deal and that he would then be the entire owner of the Smith Bros. Sheep Company.

41.

The letter of January 20, 1899, referred to in J. M. Smith's letter to N. B. Smith of January 27, 1899, could not be found. J. M. Smith did not keep his letters. N. B. Smith had no regular letter file.

42.

By registered letter on February 1st, J. M. Smith mailed N. B. Smith his check for \$10,000, being the first payment on the purchase of the estate stock. N. B. Smith sent this check through the White Sulphur Springs bank to the Union Bank & Trust Co., with instructions to have the latter bank mail him a certificate of deposit for the amount of the check. This was done. N. B. Smith listed this money among the assets of the estate for the year 1899 and paid taxes on it.

43.

On February 6th, the Union Bank & Trust Company advised J. M. Smith, by letter, that it would be pleased to honor his check for \$10,000 when it was presented. The same institution solicited that N. B. Smith, the executor, make that institution his depository for said \$10,000.

44.

On February 20th the return of sale was filed and on March 28th the Court approved the sale. [90]

45.

The matter of a guardian for the children had been discussed with Mrs. Reynolds as early as April, 1898, and was considered about the time of the Power offer.

On February 23, 1899, N. B. Smith, the executor, wrote Mrs. Reynolds saying that John M. Smith intended to apply for the guardianship of the children; that under the laws of Montana a child 14 years old could appoint his own guardian; that Willie was about that age; that if he is that old he could appoint whom he wanted and the Court would confirm the appointment; that under our laws a guardian had to be appointed so that the estate could be distributed; that he thought it was his duty to mention the matter to her; that if she had any suggestions to offer he would like to hear from her in the matter.

46.

On March 1, 1899, John M. Smith wrote the Union Bank & Trust Co. In this letter he said:

“If anyone deposits \$5,000 to my credit for an option, wire me at once at my expense, 481 El Dorado St., Pasadena, Cal. I cannot say just when I will be called to turn over the \$75,000 on the ranch deal. The money will not be drawn out of the bank but left as a credit to the administrator, N. B. Smith. As soon as I am appointed guardian, the money will be turned back to me. I pay interest for what time I have it.”

There was never any understanding or agreement on the part of N. B. Smith that the money paid him for the estate stock would not be drawn out of the bank.

47.

On March 28, 1899, the sale was confirmed by the Court [91] and order of confirmation signed and filed. Afterwards on the same day John M. Smith was appointed guardian of the children. He was then in California. Max Waterman was his attorney.

48.

On April 6th, 1899, J. M. Smith signed a check for \$75,000 payable to N. B. Smith, administrator, and gave it to McNaught for delivery to him.

On April 27, 1899, a four months nine per cent note of J. M. Smith's for the sum of \$75,000 was discounted by the Union Bank & Trust Company, and the proceeds put to his credit. On the same day a \$75,000 check to N. B. Smith, administrator, properly endorsed, was presented to, and paid by said bank and charged to J. M. Smith's account. At the same time N. B. Smith surrendered the \$10,000 certificate of deposit, dated February 10, 1899, had \$5,000 put to his credit on open account and with remaining \$5,000 and the \$75,000 received on said check bought a certificate of deposit for \$80,000 to his order as executor. The \$5,000 deposited on open account was fully accounted for.

50.

On April 28, 1899, J. M. Smith, from Long Beach,

Cal., wrote to N. B. Smith and said:

“I return power of attorney with instructions to endorse the stock that I bought of you to the Union Bank as collateral security for the payment of the \$10,000 and the \$75,000 notes in the bank.”

J. M. Smith put up the entire stock of the company as collateral security.

51.

On May 18, 1899, John M. Smith reached Montana from California and by filing his bond on May 25th in the sum of \$90,000, taking the oath of office, he qualified as guardian. [92]

52.

On June 1, 1899, the executor filed his final account. On June 12, 1899, the decree of settlement of the final account and of distribution of the W. A. Smith estate was signed, and filed on June 14th. On the last named day the executor paid the entire amount in his hands over to J. M. Smith, the guardian, and took his receipt as guardian therefor.

53.

J. M. Smith proceeded to Helena and on June 17, 1899, applied all the moneys received by him from the executor on the 14th day of June, as far as they went toward the payment of his notes of \$10,000 and \$75,000, in the Union Bank & Trust Company and gave a new note for the balance. He never told anyone of his purpose so to do nor advised anyone about it. As he had given a bond and put up all the stock of the sheep company besides, he believed he had a right to do it.

54.

On or about June, 1899, J. M. Smith spoke with Judge Armstrong about using the guardianship moneys at 4 per cent.

55.

On April 12, 1900, John M. Smith wrote the Union Bank & Trust Company as follows:

“Pasadena, Cal., April 12, 1900.

G. L. Ramsey, Helena, Mont.:

Sir: I have to report the amount of money & other property I have belonging to the estate of My Brother W. A. Smith. What I want to do is to leave the 247000 shares of the Sheep Co. Stock in the bank it is a Colatrel to represent \$84,000—it not to be drawn out or used for enny thing except in case I might happen to die suddenly & a new gardeen be apointed for his children you have all the stock in the Bank now hold it for me for that purpes until it is caled for & oblige,

J. M. SMITH.” [93]

56.

On December 11, 1900, the order allowing J. M. Smith, the guardian, to use the money in his hands at 3 per cent interest per annum, was made and entered and at the same time Waterman withdrew his name as counsel for the guardian and that of N. B. Smith was entered as attorney for him.

57.

Settlements were made with the children as soon at each became of age, because each one asked for it. No charge for his services as guardian was ever made by John M. Smith.

58.

That the sale of the stock in question was made in good faith for cash and at a price equal to its then market value.

Conclusions of Law [in Smith vs. Smith, etc., in District Court of Meagher County, Montana].

1.

As a conclusion of law the Court finds that the sale of the stock in question was valid under the facts as they existed at the time of the sale and should stand; that the plaintiff take nothing by his suit; that his complaint be dismissed and that the defendants have judgment for their costs of suit herein expended.

W. R. C. STEWART,

Judge.

Done in open court at White Sulphur Springs,
Sept. 15, 1911.

Filed September 15, 1911.

(Title of Court and Case.)

Judgment [in Smith vs. Smith, etc., in District Court of Meagher County, Montana].

This cause came on regularly for trial on the 26 day of June, A. D. 1911, Messrs. Walsh & Nolan and William Scallon and T. J. Hoolan appearing as counsel for plaintiff and R. Lee Word appearing as attorney for the defendants. The cause was tried before the Court without a jury. Whereupon, in accordance [94] with agreement and stipulation of the parties, the testimony taken in the United States Court for the Ninth Circuit, in the case wherein Nellie Mae Moore was plaintiff, and John

M. Smith, Napoleon B. Smith and Smith Bros. Sheep Company (a corporation), and Mary M. Smith, as executrix of the estate of John M. Smith, deceased, substituted as a defendant for the defendant John M. Smith, were defendants, was read and adopted and with the oral testimony of this plaintiff given in open court was considered as the testimony in this case, and the evidence being closed the cause was submitted to the Court for consideration and decision, and after due deliberation thereon, the Court on this day files its Findings and Decisions, in writing, and orders that Judgment be entered herein in favor of the defendants in accordance therewith.

WHEREFORE, by reason of the law and the Findings aforesaid, it is ORDERED, ADJUDGED AND DECREED, that William J. Smith, the plaintiff, shall not recover anything by reason of this action, and that the defendants have Judgment against the plaintiff for their costs and disbursements incurred in this action, amounting to the sum of seven and 50-100 dollars.

Done in open court, this 15th day of September, A. D. 1911.

W. R. C. STEWART,
Judge of said Court.

Filed September 15, 1911, and recorded in Judgment Record No. "5," at page 131.

Also the opinion of the Supreme Court of the State of Montana, rendered in said cause and reported in 45 Montana Reports, pages 535-582, inclusive; which opinion is as follows:

[Opinion, Supreme Court, Montana, in **Smith vs. Smith etc.**]

SMITH,

Appellant,

vs.

SMITH et al.,

Respondents.

(No. 3,142.)

(Submitted May 25, 1912. Decided June 10, 1912.)

[95]

(125 Pac. 987.)

EQUITY—ESTATES OF DECEASED PERSONS—MINORS—
EXECUTORS AND ADMINISTRATORS—GUARDIAN
AND WARD—CONSPIRACY—FRAUD—SALES—SET-
TING ASIDE—EVIDENCE—INSUFFICIENCY.

Executors and Administrators — Guardian and
Ward — Fraud — Sales — Setting Aside — Evi-
dence—Insufficiency.

1. Plaintiff's father willed his property, consist-
ing of stock in a sheep company of which he and his
brother were the principal owners, to his minor
children. The property thus disposed of was inven-
toried at \$61,475. His executor, an attorney at law
and nephew of testator, obtained an order of Court
authorizing him to sell the stock for not less than
\$75,000. Efforts to sell were unavailing. There-
after testator's brother bought the stock for \$85,000,
borrowing the purchase money from the bank. The
sale was confirmed and the buyer appointed guardian
of the minors. The executor having turned over to
him, as guardian, the funds thus realized, they were

used by him to liquidate his indebtedness to the bank, obtaining an order permitting him to borrow the money of his wards about a year later. In an action by one of the beneficiaries under the will, evidence examined and held not to disclose such alleged illegal and fraudulent transactions in aid of a conspiracy between the executor and the purchaser (guardian of the minors), as to warrant a court of equity to set aside the sale.

Same—Larceny—Evidence—Insufficiency.

2. Where a guardian who had given ample security to account for all funds coming into his hands as such and who was personally able to raise the amount thereof on demand, under a misapprehension that he had a right to do so, temporarily employed guardianship funds to repay a loan, thus technically appropriating them to his own use, he nevertheless could not be adjudged guilty of larceny under section 8656, Revised Codes, especially where at the settlement of the estate he fully accounted for all moneys paid over to him as guardian.

Appeal from District Court, Meagher County, W. R. C. Stewart, Judge of the Ninth Judicial District, presiding.

Action by William J. Smith against Mary M. Smith as executrix of the last will and testament of John M. Smith, deceased, and others. From a judgment in favor of defendants and an order denying his motion for a new trial, plaintiff appeals. Affirmed.

Mr. William Scallon, Mr. T. J. Hoolan, Mr. T. E. Nolan, and Messrs. Walsh & Nolan, for Appellant, submitted an original [96] as well as a reply

brief; Mr. T. J. Walsh argued the cause orally.

Mr. L. O. Evans, Messrs. McIntire & McIntire, and Mr. R. Lee Word, submitted a brief in behalf of Respondents. Mr. Evans and Mr. Word argued the cause orally.

MR. JUSTICE SMITH delivered the opinion of the Court.

This is a suit in equity, the purpose of which is, in effect, to set aside a sale of 40,983 $\frac{1}{2}$ shares of the capital stock of the Smith Bros. Sheep Company, made by Napoleon B. Smith, as executor of the last will and testament of William A. Smith, deceased, to John M. Smith in his lifetime, and to obtain an accounting. The plaintiff is a son and one of three heirs at law of William A. Smith, deceased. His two sisters, Annie Maud Kahle, residing in the State of Ohio, and Nellie Mae Moore, a resident of the State of Missouri, are the other heirs at law of their father. A suit, similar to the instant one, was begun in the Circuit Court of the United States for the District of Montana by Nellie Mae Moore; that Court entered a decree in favor of the defendant, which was reversed on appeal by the Circuit Court of Appeals for the Ninth Circuit, the latter court ordering a decree in favor of the complainant, substantially as prayed for. This cause was tried to the District Court of Meagher County, sitting without the aid of a jury. The result was a decree or judgment in favor of the defendants, from which, and an order denying a new trial, the plaintiff has appealed. The action was, by stipulation, submitted to the District Court on a printed transcript of the evidence taken in the case

of Nellie Mae Moore against the defendants, theretofore heard in the Federal Court, supplemented by a brief examination of the plaintiff touching the circumstances under which he made settlement with his guardian, John M. Smith, on arriving at his majority. As stated in the brief [97] of counsel for the appellant, "the cause is before this court, for determination on identically the same evidence on which it was heard in the circuit court of appeals." We therefore take the following statement of facts from the opinion in that case. (See *Moore v. Smith*, 182 Fed. 540):

"The record shows that for many years John M. Smith and (1) William A. Smith, who were brothers, were the owners of a large amount of land in the State of Montana, upon which they carried on the sheep, cattle and horse business. At first they managed the business themselves, but in 1890 they organized a corporation under the laws of Montana, under the name of Smith Bros. Sheep Company, to which corporation they conveyed all of their property. Each of them was married, and to the wife of each was given 5,000 shares of the capital stock of the company, which amounted to 250,000 shares. The remainder of the stock was divided equally between the brothers. The wife of William A. Smith deserted him in 1891, leaving three small children—the oldest a boy then seven years old, and two younger girls, the older of whom was the complainant in this case and is the appellant here. These children, William A. Smith subsequently sent to live with their aunt, a Mrs. Reynolds, in Ohio, who was a sister of the two brothers. Napoleon B. Smith, who was

their nephew, was an attorney at law residing at White Sulphur Springs, Meagher County, Montana, in which county most of the property of the brothers was situated, and in which they both resided. William A. Smith died there on February 13, 1897, and on his deathbed made his will, which was drawn by Napoleon B. Smith, by which will he left all of his estate to his three children and appointed his said nephew executor thereof.

“During the course of his examination as a witness, John M. Smith was asked what, if any request, his brother William made of him in his last illness regarding his children, and answered: [98] ‘A. The last words that he said to me was, “N. B. Smith is my administrator and he will attend to the affairs in that way, and I want you to look after the interests of my children.” Those were the dying words that he said. Q. And did you say you would? A. I said I would, and I have, faithfully. At the time of his death William A. Smith was the owner of 122,950 shares of the stock of the Smith Bros. Sheep Company—John M. Smith then owning a majority of the stock.

“The case shows that John M. Smith was himself then in poor health, as was his wife, and that in consequence he spent much of his time at Pasadena, California, where he was at the time of much of the correspondence hereinafter referred to. Some time after the business was incorporated one McNaught, who was a brother in law of John M. Smith, became manager of the property under the supervision and direction of the latter. The will of William A. Smith was admitted to probate, and Napoleon B.

Smith became executor of his estate. After the death of William A. Smith, and because of the age and poor health of John M. Smith, and perhaps from other reasons, both John M. Smith and the executor became desirous of selling the whole property. A sale by John M. Smith of his majority of the stock to a stranger might have worked to the injury of the minority interest of the children of the deceased William A. Smith, so that both John M. Smith and the executor of the estate of William A. Smith became desirous that both interests be sold together. Repeated efforts in that behalf failed of accomplishment.

“On the 23d of November, 1897, McNaught asked for an option of purchase, to run until the end of the year, on all of the property, free of debts, except future payments on certain railroad land contracts, on which application J. M. Smith indorsed this: ‘My figures is two hundred and twenty thousand, [99] \$220,000 Subject to the approval of Mary Smith (wife of John M. Smith) & N. B. Smith to date from Jan. 1, 1892 time to complete sale about to the 10 of Jan. 1898. J. M. Smith.’ The executor of the estate of William A. Smith indorsed thereon the following: ‘In case a buyer can be found for the property at the amount above stated I will immediately make application to the district court of Meagher county, Montana, to sell the interest of the Estate of W. A. Smith, deceased, in said property at the rate above stated.

(Signed) N. B. SMITH.’

“The evidence shows that the executor regarded the estimate of John M. Smith as to the value of the

property at the time too high, as did others.

“On the 14th of December, 1897, John M. Smith wrote a letter from Martinsdale, Montana, to the executor, which reads in part as follows: ‘N. B. Smith Der Sir & Nefue. . . . Mr. McNaught is back from Helena he could not get a party to take hold of the property, but I think the chance will be better next summer I want to sell out so as to go some plase that I can be with my famley & can send Stanley (his son) to school as long as I hold it I can’t be sadesfied away from it & I dont want to sell out & leave the childrens interest in it. I think the coming year will be the time to let gow of the intire plant you can at the next turm get a permit to sell wills intrest at anney time that we can get fair value for it then we can go ahead with it when the opertunity Shows up I think it will be well to arange that the text turm of Court I dont think that we will sell much befoar next July or Auges but I dew want to sell as soon as we can to advantage if I was yong I would not cair to sell for it is a good property well managee at what I ask for it.’ [100]

“The record shows that on the 24th day of January, 1898, the judge of the probate court made an order based upon the application of the executor, authorizing him to sell all of the 122,950 shares of the stock of the company belonging to the estate of William A. Smith, deceased, ‘at private sale and without previous notice, provided that said personal property be sold at a sum not less than seventy-five thousand dollars, and may indorse said stock for the purpose of said sale, and may do all other acts and things requisite and necessary to transfer all of the

interest of said estate in and to said stock and the property represented by said stock. That said stock be present at the time of said sale, and that said executor present to this court at the next term thereof after such sale, an account of sale, verified by his affidavit.'

"On the 19th of the following March, John M. Smith wrote a letter from Helena, Montana, to the executor, which is in part as follows:

" 'Mr. N. B. Smith Dear Nefue

" 'I wish to get the least price that you can excep for the children stalk (stock) I may have to dew some figuring to sell the Plant & in case I knawed fest how much I could drop and pay all debts it would give me a chance to handel my self what would you give me a option on the Stock after the debts is payed I think you said the order was for you to sell for \$75,000 but we think we can dew better than that. I think I can get them 80 or 85000 out it clear for them now can you name enney price that would soat you to give a opehen on so I might have a maregen to mark (work) on think the matter over & let me know.

" '(Signed) J. M. SMITH.'

"On March 25, 1898, the executor replied as follows: [101]

" 'Office of N. B. Smith, County Attorney, Meagher County.

" 'White Sulphur Springs, Mont.,

" 'March 25th, 1898.

" 'Dear Uncle: Your letter in regard to the stock of the estate came to hand. I have been thinking

over the matter. I think rather than see a sale go bye I would be willing to take \$85,000 for the stock. I want to do what is fair by the estate and also by you. I want to see a sale go through in some shape, but at the same time I want to do the best I can for the estate. I would want the \$85,000 alone for the stock, and the party who gets the stock to pay all the debts of the company, and also that the sheep company cancel whatever debts it might have against the Alice or Blackhawk Mining Companies.

“ ‘Yours truly,

“ ‘(Signed) N. B. SMITH.’

“On July 2, 1898, John M. Smith wrote to the executor as follows:

“ ‘Smiths Ranch July 2 1898.

“ ‘N. B. Smith Dear Nefue

“ ‘I have been figerin since you laft on this Sheep Sale you know that our Judgment difers as to the value of the property you being willen to take less than would satiesfy me & thaught that you would rather than miss a sail would take \$80000 for the pert you represent rether than miss a sail it was on that bases that I made my offer to Mc My offer gave me a margeen that would sadesfy me but I dont have a small margen it cuts me down so low that I dont feal sadesfiged if I had made my figers with the intent of giving you the benefit of my Judgment I should have plase my figers higher than I did so you can see that your astemate throwed me off in my calculation & will bring me out with less money than is sadesfactory to me & Mary I told her as you was willing to take less than I thought the stock worth & I was

willing to take 80000 that I would have a [102] margin to work on & best my offer acorded now under theas circumstances I think you can afeard to take \$84000 as your figers estemate 85000 now if I can have a small margen to work on as I dont know jest what it will take to Squair all debts but I think if I can get yours at \$84,000 that I will still have a small margein to work on if this deel goes but I would not be sadesfied to take the offer & devide equal as our Judgment difered as to value I made the offer below what I should have done if I had not had some aserence that you would take 80000 for the interest now if you think you can take 84000 I think that will be very close to to it if the sail goes if you cant aford to take that Mary may not sell her stock & and that will spoil the sale if enny can be made atall. let me know at onse So I cam caluculat acorden.

“ ‘Your uncel,

“ ‘JOHN M. SMITH.

“ ‘If we dont sell this time we may get that much.’

“December 30, 1898, came without the effecting of any sale, although strenuous efforts in that behalf were made by John M. Smith (to one Miles, among others) as well as by McNaught. On the day last mentioned Henry Neill made to the executor the cash offer of \$80,000 for the stock belonging to the estate. The next day the executor wrote to John M. Smith this letter:

“ ‘Office of N. B. Smith, County Attorney, Meagher County,

“ ‘White Sulphur Springs, Mont.,

Dec. 31st, 1898.

“ ‘Dear Uncle: Neill of Helena was in to see me yesterday in regard to the ranch property. He wanted an option on my interest. I told him I could not give it at this time as I had let you have option. If you are figuring on Miles making a trade I think you had better look for other parties. Neill thinks he can sell the property. I am very anxious to do something with the property as I feel that the estate is going to lose money [103] by holding it. Heitman and Danzer have a large number of sheep feeding in east and it is the prevailing opinion of those who know that they will lose from 50 cents to a dollar a head on the transaction. Neill said he would make me a cash offer of \$80,000 for the estate's interest in the property. If you will make me a cash offer of \$85,000 you can have the property. I told Neill I would not make such an offer. McNaught writes me that you now owe the company \$13,839.35, and that the company will have to commence borrowing money. If you do not take the stock it would be your duty to put your note in to the company for the amount so that the company could raise the money on the same to carry on the business. Under our law the only money can be drawn out of a company by a stockholder is by declaring so much dividend on each share of stock. I do not make the suggestion to hurt your feelings, but you know yourself that such large transaction should not be carried on in such a loose way. Please let let me hear from

you in the matter. We are all well. I wish you all a happy new year. I got a letter from Barnes at your place. Give all the Montana people my best regards.

Your nephew.'

"On the 14th of January, 1899, John M. Smith wrote to Mr. George L. Ramsey, cashier of the Union Bank & Trust Company, Helena, Montana, this letter:

" 'Pasadena, Cal., Jan. 14, 1899.

" 'Mr. George L. Ramsey, Helena, Mont.

" 'Would your bank lone ninty thousand dollars to me a& take the entire stock of the Smith Bros Sheep Co as security. I consider it gilt edge I am about to buy the estates intrest I will onley want it ontell I can make a sale of the property perheps 4 or 5 months. Wire me your lowest rate of intrest & if I can get it wire at my expense all the compny owes is the [104] \$2000—that I sent the Note for the othr day.

Yeuis Truly

" 'J. M. SMITH.'

"Two days thereafter, to wit, January 16, 1899, John M. Smith wrote from Pasadena, California, to the executor at White Sulphur Springs, Montana, as follows:

" 'N. B. Smith Dear Nefue W. S. Springs I wired you that I would except your offer for the Stock of the Sheep plant belonging to the children I have not herd from Miles yet if he makes a raise I will pay you the \$90000 if he fails I will give you the \$85000 that you aske you of corse would put it in goveoment bonds if you had it now to make things safe & you be absolutely safe I will give you all of the

Sheep Company Stock to hold as security for the payment of the \$85000 & I will pay the same interst that you would get on Gov bonds & pay you 3 times per year ontill I can sell out to advantage then you will be safe & if enny one is looser it will be me & I am willing to take the chances they never will be a time but what the hole business will bee the best security for that amount but I dont intend to hold it very long at enny time that I can make a good sale I will pay off your \$85000 I think this the best way for us to close up business I intend never to run less than 40000 head of sheep on the ranch as long as I have ennything to dow with it by you holding all the stock as Secutiyy no one could com in ontill your Notoe is payed first I never tried to get in debt much enny more as I intend to keep close payed up all land payments & Taxes & keep the Smith Bros Sheep Co Cr as good as has always bin you can get up the papers so you ar safe & at the same time gives me a chance to handel my self to advantage f if Miles fails you & Mac can fix things so that I will not have to come ontill Apr or May or may you can send the Papers [105] down hear for I and Mary to signe I will pay all revenewe Stamps requires I don't think you will have to pay taxes on the \$85000 while it is repesented by the Smith Bros Sheep Co Stok as I have to pay on all the property if you did have to pay taxes I will agree to pay it for you Si it will leave it just the same as gov bonds now I hope you will consider this & after Feb the first proceed to fix up the papers or soaner if you wish I could borrow the money of the Bank of Helena by giving the sae seciorty but I would soaner deel with you & you ar

jest as safe as tho you had gov bonds let me hear from you at once & oblige

“ ‘Your uncel JOHN.’

“On the same day, to wit, January 16, 1899, the executor wrote from White Sulphur Springs, Montana, to John M. Smith at Pasadena, California, the following letter:

“ ‘Office of N. B. Smith, County Attorney, Meagher County,

“ ‘White Sulphur Springs, Mont.,

Jan. 16, 1899.

“ ‘John M. Smith, Pasadena, Cal.

“ ‘Dear Uncle: Your telegram came to hand in which you said you would take the stock. I want a clear understanding with you, so that there may be no hereafter in the matter. It is understood that I am to get \$85,000 for the stock and the estate is to have that and not owe the Company anything for money advanced for uncle Bill’s estate. Mack wrote me the other day about the four hundred dollars you were to pay, but I will make no claim as to that if you take the property at the above figure. You had better pay a portion down and then I will make the return to the court, and if the court approves of the sale, of which I have no doubt, I will want the remainder of the money Please let me hear from you at once in the matter.

“ ‘Yours truly,

“ ‘N. B. SMITH.’ [106]

“The record shows that on the 20th of January, 1899, the executor wrote to John M. Smith a letter which in some way disappeared, and is not produced. Before it could have been received at Pasadena, Cal.,

John M. Smith wrote from that place to the executor this letter:

“ ‘Pasadena, Cal., Jan. 22, 1899.

“ ‘N. B. Smith.

Dear Nefue. I received yours of the 16 in reply to my telegram, I had written 2 letters that you have no doubt received before this in which I asked terms but have not heard from either yet it doesn't look as tho Miles is going to make a deal. I now will ask you the amount you wish me to pay down on the property & what interest you want on the balance I will take the Astates Stock at \$85000 and no claim on the Astate for any money advanced it at any time tell me the least you will take as a down payment & what time you will give on the balance & what interest until paid & you hold all the property as security I made you a proposition in my last but don't know how it will suit you please give me your best terms as soon as you get this and I will arrange to meet it on the \$85000 basis. Yours Truly. Your Uncle John. I think the court will approve of the security & offer for the balance I know your Bondsman would I don't think that it will take me longer than May the first to make some turn. So I will get the balance for you.'

“On the 21st of January, 1899, Mr. Ramsey, cashier of the Union Bank & Trust Company, of Helena, Montana, wrote this letter to John M. Smith: “ ‘Mr. J. M. Smith, Pasadena, California.

“ ‘Dear Sir: In response to your favor of the 14th, we have wired you to-day that we would make the loan of \$90,000 at 9% interest. We suggest in the

telegram, however, that the offer to make would be based upon whether or not you should use the money at once. Unless you could take it right away, we [107] would not, of course, want to carry so large a sum here for any particular length of time, awaiting investment. I really hope you will be able to use it. If you have not telegraphed us at the time this letter reaches you of your conclusion as to whether or not you can use the money, we want to ask you to do so, as the loan is a large one and we might have to loan the funds elsewhere, which we would not do, in anticipation of your possible call for these funds.

Yours respectfully,

“ ‘GEORGE L. RAMSEY, Cashier.’

“That John M. Smith replied by wire to the letter last quoted that he did not want the money is shown by this letter from Ramsey of date January 28th, 1899:

“ ‘January 28, 1899.

“ ‘Mr. John M. Smith, Pasadena, Cal.

“ ‘Dear Sir: We now have your telegram reading: ‘Do not want money,’ which is interpreted to mean that you are not in a position to use the money just at the present time. But that you may possibly desire to later. If our surmise is correct, I beg to advise you that we will be glad to figure with you whenever you are ready; but we would not of course want to promise so large an amount of money at any time in the future as it is a considerable sum and we may have to invest it elsewhere. Just at this time we would be very glad to make the loan and it is pos-

sible we may be in the same position whenever you get ready.

Yours respectfully,

“ ‘GEORGE L. RAMSEY,

“ ‘Cashier.’

“January 24, 1899, the executor wrote to John M. Smith at Pasadena, California, as follows:

“ ‘N. B. Smith, County Attorney, Meagher County.

“ ‘White Sulphur Springs, Mont.,

“ ‘Jan. 24, 1899. [108]

“ ‘J. M. Smith, Pasadena, California.

“ ‘Dear Uncle: Your letter of the 16th of Jan. came to hand. I cannot sell the way you indicated. The only way I can sell is for cash down. If you are appointed guardian of the children then I could turn the money over to you. As I told you all the time I have no right to sell on credit. You had better forward me a draft for ten thousand and then I will file the petition, and on the approval of sale by the court the balance can be paid. The offer that I had was a cash down offer. If you but (buy) the stock the company can run on just the same and I can act as one of the trustees as I have some stock in my own name. Give my love to all.

“ ‘Yours, etc.’

“Before the letter last quoted could have been received, John M. Smith wrote from Pasadena to the executor as follows:

“ ‘Pasadena, Cal., Jan. 27.

“ ‘N. B. Smith:

“ ‘Dear Nefue: I received yours of the 20 & I think your plan good I will take steps to get the ten thousand down payment & we will proceed to business at

once I will write to the Bank & arange for the money if you have me appointed garden for the Children as soon as I sell out I uou & ('Want to,' according to original exhibit) invest in Gove bonds all thair money and also my one as I don't intend to try to dew enny business after I sell out & I fully intend to let goew this spring I think your sugjection a good one I think I should have the children come out hear the schools is first clas & the climat is good also good society.

Yous Truley

“ ‘J. M. SMITH.

“ ‘will wright agane soon.’ [109]

“On the same day, to wit, January 27, 1899, John M. Smith wrote from Pasadena, California, to Ramsey, this letter:

“ ‘Pasadena, Cal. Jan. 27, 99.

“ ‘G. L. Ramsey Helena Mont.

“ ‘I received yours of the 23 in regard to the mony I did not want it all at once. I received a letter today from the administrator & now I am in shape to use ten thousand of the money at once. I wish the lone for 6 months with the understanding that I have the privilege of paying it at enny time I can befour it is dew intrest to be at the same for what time I have used the money. You understand I want the money to make a payment on the estate of my brother the money will be turned over to the administrator N B Smith at White Sulphur Springs if you will you can make out a Note for ten thousand & send it hear to me I will signe & return then I will turn it over to the admnestratr & close a deel then I

will be the centier oner of the Smith Bros Sheep Co.

“ ‘Yous respetfully,

“ ‘J. M. SMITH.’

“ ‘Four days thereafter, to-wit, January 31, 1899, John M. Smith wrote to Ramsey as follows:

“ ‘Pasadena, Cal Jan 31 1899.

“ ‘George L Ramsey Helena

“ ‘ ‘Sir: I have taken the liberty of drawing a check on your Bank for ten thousand Dollars \$10,000—in favor of N. B. Smith of White Sulphur Springs the adminestratr of my Brothers astate I dont think that the money will be caled for onley plast to his cr. I in-close his letter so you can se how we intend to manage so that I din’t think we will have to call for enny of the money will leave it as a creddet for when I am apointed gardeen of the children I will turn it all back to the Bank and pay what intrest has acrued for what time we have the [110] money. hoping this will meat your aprovel I wrote you a letter a few days ago asking you to forward me a Note for \$10,000—for me to signe but I have not received it yet hoping you can favor me with my request & oblige.

“ ‘J. M. SMITH.’

“ ‘On the 2d of February, 1899, Ramsey wrote to John M. Smith, as follows:

“ ‘ ‘Mr. John M. Smith, Pasadena, California.

“ ‘ ‘Dear Sir: We enclose you herewith a blank note for \$10,000, sent agreeable to your favor of the 27th, drawn for six months, with the understanding that you shall have the privilege of taking it up at any time prior to maturity if you like, interest to be charged only for the actual time the money is in use.

I also inclose several blank notes, which can be filled up by you at any time the money is needed. With regards, I am,

Yours respectfully,

“ ‘GEORGE L. RAMSEY,

“ ‘Cashier.’

“On February 6, 1899, Ramsey wrote to John M. Smith as follows:

“ ‘Mr. J. M. Smith, Pasadena, California.

“ ‘Dear Sir: We now receive your letter of January 1st (31st) and beg to advise that we shall have pleasure in honoring your check for \$10,000, when it shall be presented. We return herewith letter from N. B. Smith. With regards, I am,

“ ‘Yours respectfully,

“ ‘GEORGE L. RAMSEY,

“ ‘Cashier.’

“On February 6th Ramsey also wrote to N. B. Smith this letter:

“ ‘Union Bank & Trust Company of Montana.

“ ‘Helena, Feb. 6, 1899. [111]

“ ‘Mr. N. B. Smith, White Sulphur Springs.

“ ‘Dear Sir: Receiving a letter to-day from Mr. J. M. Smith, advising that he had drawn on us for \$10,000 in your favor, and this letter indicating that he would probably draw further checks, I am lead to suggest that we would be very happy indeed to serve you as a depository, for all or a part of the proceeds of the check, if it is in your plans to leave it on deposit.

Yours respectfully,

“ ‘GEORGE L. RAMSEY,

“ ‘Cashier.’

“On the 8th of February, 1899, John M. Smith wrote to Ramsey as follows:

“ ‘Pasadena Cal Feb 8 1899.

“ ‘G L Ramsey yours of the 2 came to hand last night I hear sign & return Note. When I am caled on for the balance I will fill out & sent on Notes to cover the balance of the perches. I dont think that one dollar of it will be caled for except as a credit with me. Many thanks for your acomedation.

“ ‘Yours Truly

“ ‘JOHN M. SMITH.’

“On the same day, to wit, February 8, 1899, the executor wrote from White Sulphur Springs, Montana, to the Union Bank & Trust Company, as follows:

“ ‘White Sulphur Springs, Mont.,

“ ‘Feb. 8th, 1899.

“ ‘Union Bank & Trust Co., Helena, Mont.

“ ‘Gentlemen: I don’t know yet what disposition I will make of the money that J. M. Smith will place to my credit. I would want a certificate of deposit payable on demand. If my Mr. Smith is appointed guardian this money will be turned back [112] to him. I will make no arrangements about the money at this time as I want to get the estate settled up as soon as possible

Yours truly,

“ ‘N. B. SMITH.’

“On February 10, 1899, a certificate of deposit for \$10,000 was issued by the Union Bank & Trust Company, and sent to the executor, with a letter of that date in which the bank said: ‘We are this morning placed in possession of your favor of the 8th instant

and having instructions from the First National Bank of White Sulphur Springs to send you certificate of deposit for J. M. Smith's check of \$10,000, we are now having pleasure in handing you same herewith. We note that you do not care to make arrangements about the money at this time, as it is your desire to get the estate settled as soon as possible.'

"On February 12, 1899, the executor wrote to the Union Bank & Trust Company this letter:

" 'White Sulphur Springs, Mont.,

" 'Feb. 12, 1899.

" 'Union Bank & Trust Co., Helena, Montana.

" 'Gentlemen: Your favor of the 10th enclosing draft for \$100000 (\$10,000) came to hand. I am much obliged to you for your kindness in the matter. I presume I will leave the money with you for the present, as I have no use for it. If my uncle is appointed guardian of the children, then in that case, the money will all be turned back to him as guardian. I think I can wind up the estate within three months. I shall be pleased to meet you when I come to Helena which may be some time in this month.

" 'Very respectfully,

" 'N. B. SMITH.' [113]

" 'The executor proceeded to make application for the confirmation of the sale of the stock, and engaged, in behalf of John M. Smith, an attorney named Waterman to make application for the appointment of John M. Smith as guardian of the children, the return of sale being filed with the court by the executor on the 20th of February, 1899, and three days

thereafter, to wit, February 23, John M. Smith's application for his appointment as guardian of the children was filed by Max Waterman as his attorney. On that same day, to wit, February 23, 1899, the executor wrote to Mrs. Reynolds this letter:

“ ‘Office of N. B. Smith, County Attorney, Meagher
County,

“ ‘White Sulphur Springs, Mont.,

“ ‘Feb, 23, 99.

“ ‘Dear Aunt: Uncle John intends to apply to be the permanent guardian of the children. I presume you will be notified in the matter. Under our law a child that is fourteen years of age can appoint his own guardian. I think Willie is about that age. If he that old he can appoint who he wants and the court will confirm the appointment. Under our law a guardian had to be appointed so that the estate can be distributed. The estate will have to go into the hands of a guardian so that it can be invested in bonds. Uncle John's address is 481 Eldorado Street, Pasadena, California. He will have to give a bond to the amount of about ninety thousand dollars. I don't think he will make any change in the case of the children, and he can't make any change after the children become 14 years of age for then they can appoint their own guardian. I thought it my duty to mention the fact to you so that you might understand the proceedings and why they were taken. You see I will have the eighty-five thousand dollars, and the same must be invested which I could not well do as executor. It was uncle Will's desire that you should look after the children and that desire will no

doubt be carried out. I have explained fully because I [114] thought you might worry in the matter. If you have any suggestion to offer would like to hear from you in the matter. Give my love to the children.

Yours etc.

“ ‘N. B. SMITH.’

“On the 1st day of March, 1899, John M. Smith wrote from Pasadena, California, to Mr. Ramsey at Helena, Montana, as follows:

“ ‘Pasadena, Cal., March 1, 1899.

“ ‘George L. Ramsey Helena Mont. If enny one deposits \$5000—to my cr for a option Wire me at once at my expen 481 El Dorado St Pasadena Cal. I cant say jest when I will be cald to turn over the other \$75000—on the Ranch Deelee. the Money will not be drawed out of the Bank but left as a cr to the adminestrater N. B. Smith as soon as I am appointed gardeen the money will be turne back to me I pay intrest for what time I have it. Will I have to send my note or can you pay my check by Cr to N. B. Smith for the amount & he leave it in the bank & transfer it back to me.

“ ‘Yous Tuely

“ ‘J. M. SMITH.’

“March 10, 1899, the Union Bank & Trust Company wrote to N. B. Smith this letter:

“ ‘Union Bank & Trust Company.

“ ‘Helena, March 10, 1899.

“ ‘Mr. N. B. Smith, White Sulphur Springs.

“ ‘Dear Sir: As you are perhaps aware, we had made arrangements with Mr. John M. Smith to advance him the sum necessary to purchase the *the* es-

tate's half interest in the Company. He writes us by letter received to-day, as follows: 'I can't say just when I will be called to turn over the other \$75,000 on the ranch deal.' The amount to be advanced on this transaction [115] is a large one, and we like to figure ahead a little bit, so that we may calculate at all times upon the amounts which we have arranged to advance to our several customers, and I am going to take the liberty of inquiring whether you can tell us at this time about when the balance will be called for, so that we can figure accordingly. We felt quite a bit complimented at your making us your depository for the payment that has already been made by Mr. Smith, and I assure you we will be happy to serve you in the future as well.

“ ‘Yours respectfully,

“ ‘GEORGE L. RAMSEY,

“ ‘Cashier.’

“On the 28th of March, 1899, the sale of the stock of John M. Smith was confirmed, and the order of confirmation signed and filed. On the same day, to wit, March 28, 1899, John M. Smith, who was then in California, was appointed guardian of the persons and estates of the minors, the order made and filed reciting due notice of the application, and directing ‘that letters of guardianship of the persons and estates of said minors be issued to him upon his giving a bond to each of said minors in the penal sum of thirty thousand dollars, and upon his taking and subscribing the oath according to law.’

“On the 18th of April, 1899, John M. Smith, wrote

from Pasadena, California, to Mr. Ramsey, at Helena, Montana, as follows:

“ ‘Pasadena, Cal Apr 1899.

“ ‘Mr. G. L. Ramsey Helena Mont

“ ‘I will be in Helena about the 18 of May. I leave hear the 13 then I will be ready to straten out business sadsfactry I hope I will have McNaught send the Stock over to the Bank so it will be thair when I get back I will have N B Smith meet me in Helena & then we can fix up every thing sadesfactory I drew [116] a check to N. B. Smith for \$75,000—but I dont think he will Send it in Ontill I get back.

“ ‘Yours Truely

“ ‘N. M. SMITH.’

“April 24, 1899, the bank replied to John M. Smith by letter, saying: ‘We are ready to honor your check for \$75,000 when Mr. N. B. presents the same.’

“On the 27th of April, 1899, a four months note for \$75,000 of John M. Smith, bearing 8 per cent interest, was cashed by the Union Bank & Trust Company, and the proceeds put to his credit, with which the bank paid the \$75,000 check which John M. Smith had given upon it to the executor, and which was by the executor indorsed, such payment being then charged by the Bank & Trust Company to John M. Smith’s account. The before-mentioned \$10,000 certificate of deposit was at the same time surrendered by the executor, who took from the Bank & Trust Company a certificate of deposit to his order for \$80,000 and deposited \$5,000 of the amounts mentioned to his personal credit; \$2,161.49 of which he paid himself as due him ‘on the sale of property,’

and the balance to other persons and for other purposes.

“On the 28th of April, 1899, John M. Smith wrote from Long Beach, California, to the executor, this letter:

“Long Beach, Cal., Apr. 28, 1899.

“‘N. B. Smith:

“‘Dear Nefue I return Pour of atorney (appointing N. B. Smith John M. Smith’s attorney in fact) with instictions to indors the stock that I bought of you to the union Bank as colateral security for the payment of the \$10,000 & \$75,000 nots now in the bank. I am booked to leave hear the 13 of May for Helena will arrive about the 17 or 18 & want you to meat me in Helena at that time If I should decide to make it later [117] I will wire you to that affect. . . .

“‘Yors Truly our love to orseal.

“‘J. M. S.’

“John M. Smith returned to Montana from California on the 18th of May, 1899, and on the 25th of the same month executed his bond as guardian and took the oath of office and filed them with the court. June 1, 1899, the executor filed the final account of his administration of the estate of William A. Smith, and on the 12th of June of the same year a decree settling the account and distributing the estate was signed and on the 14th of June, 1899, placed upon file, the decree providing, among other things: ‘That the said executor shall be finally discharged from his duties as such executor upon his filing a receipt for the residue of said personal property duly signed

by John M. Smith as guardian of William Smith, Nellie Mae Smith, and Annie Maud Smith, minor children of said deceased, and upon the filing of such receipt his bondsmen as such executor shall be discharged.'

"On the same day, to wit, June 14, 1899, the executor paid the entire amount in his hands over to the guardian, John M. Smith, and took his receipt therefor as such guardian, whereupon an order of final discharge of the executor was signed and filed. John M. Smith thereupon went to Helena, Montana, and on the 17th of June, 1899, there used the money of his wards so received by him in discharging his indebtedness to that bank, as far as it would go, giving a new note to the bank for the balance due it from him. John M. Smith was questioned in respect to that matter when upon the stand as a witness in this cause, and gave this testimony:

" 'Q. Mr. Smith, I believe you said this morning that you had used the money turned over to you by Mr. N. B. Smith when you were appointed guardian, to pay your notes at the bank? [118]

A. I did.

" 'Q. Was the money cash that he turned over to you, or was it certificates of deposit? A. It was a certificate of deposit; it wasn't counted out as cash, but it was a credit certificate of deposit that he turned over to me when I qualified as guardian, he turned it over to me as administrator. I done business with the bank here, and I will refer to them. I cannot remember just about how it was done at the time, but I will refer you to the bank and Geo. L. Ramsey;

they are better authority than my memory is, a great deal.

“ ‘Q. I will state, Mr. Smith, for your information, that these two certificates of deposit were produced here by the bank officers. A. The certificates of deposit were turned over to me as guardian of the children of William Smith by the administrator.

“ ‘Q. I will state, Mr. Smith, for your information, that these two certificates of deposit were produced here by the bank officers. A. The certificates of deposit were turned over to me as guardian of the children of William Smith by the administrator.

“ ‘Q. And you turned them into the bank in payment of your note? A. I thought I had a right to.

“ ‘Q. But you did? A. I did, I thought I had a right to, because I gave security for the amount.

“ ‘Q. Did you understand when you did that that you were using money of minors for your own purposes? A. I understood I was using it, and that I had a right to; I didn't talk with anyone about it.

“ ‘Q. You thought that you had a right to take the money of minors and use it to pay your debts? A. As I had given security for that money, it was the same as though it was in my possession. [119]

“ ‘Q. Do you understand that you, as a guardian, had the right to use guardianship money, the money of minors, to pay your own debts and for your own personal account? A. I may have made a mistake, but I didn't do it with the intention of defrauding anybody; I might have made a mistake.

“ ‘Q. But you knew what you were doing? A. I knew I was paying off my indebtedness.

“ ‘Q. And using the money of minors? A. The money that was given security for.

“ ‘Q. Without asking anybody’s permission? A. Without asking anybody’s permission.

“ ‘Q. Without consulting anybody? A. I didn’t do it with the intention of defrauding anybody, and if I have wronged anybody in any way I am willing to make it right.

“ ‘Q. Was it your view at that time that you as guardian had a right to do such a thing? A. I thought this way: that it was just the same as if I put it in government bonds if I paid the same interest. I acknowledge it may have been wrong, but I didn’t do it with the intention of defrauding anybody. I paid off my note, and that is the condition of things just as they were.’

“N. B. Smith, the executor, testified that he did not know until the fall of 1899 what use the guardian had made of his wards’ money; that “in October, or before October, 1899, the guardian told him. He also testified in answer to the question, ‘Did you report the fact to the judge of the court that the money you had given to John M. Smith, turned over to him as guardian, had been used by him to pay off his own debts?’ ‘I made no such report whatever.’

“On the 20th of November, 1899, N. B. Smith wrote to Mrs. Reynolds this letter: [120]

“ ‘Office of N. B. Smith, County Attorney, Meagher County.

White Sulphur Springs, Mont.

Nov. 20, 1899.

“ ‘Mrs. D. B. Reynolds, Fayette, Ohio.

“ ‘My Dear Aunt: Enclosed find draft for four charges for looking after and caring for the minor children of Uncle Bill, until December 1, 1899. Please sign the enclosed receipt. In regard to uncle John buying the stock will say that he borrowed the money from a bank in Helena to buy the stock. I would not let him have the stock until he had actually paid me the money. I had the money in my name in the bank until I was finally discharged from my trust. When I made my final account I showed the judge the draft, and my bank account subject to check. I turned over to him the money and took his receipt for the same, and filed the same in court and the same is now a matter of record. The Union Bank & Trust Company furnished his bond and same is perfectly good. He had to pay the bank quite a sum of money for furnishing the same. I think he has to pay about three hundred dollars a year for his bond. The judge and uncle John and I talked over the matter of the use of the money, and the understanding was that he should pay four per cent for the use of the money until such time as it should be invested in bonds. That is better than we could do with government bonds, and as long as the Union Bank & Trust Company is his surety the same is perfectly safe. Nothing has been said as to the compensation that the court will allow him. I think

the compensation would be arrived at in this way, he would be allowed his actual expenses in looking after the children, and a reasonable amount for what time spent in looking after the children and their estate, and the costs connected with the court procedure. In cases of administrators the law fixes the compensation at a certain per cent based on the value of the [121] estate. I don't think the court would fix his compensation at anything unreasonable. Uncle Bill reposed confidence in me and I think I did the best thing for his children that could have been done in making the same. Before making the sale I talked with the best business men of the county in relation to the matter, and not one but what told me to close the sale as I had made a great deal. Although I am no longer administrator, yet I shall always look after their interests. . . .

“ ‘Your nephew.’ ”

“Both John M. Smith and N. B. Smith gave some testimony tending to show that in 1899 the former had some talk with the judge of the court in which the guardianship matter was pending, about his (John M. Smith's) using the money of the minors and paying interest on it at the rate of four per cent per annum.

“In December, 1900, this order was made and entered in the matter of the estate and guardianship of the minors:

“ ‘Probate Minutes, December, 1900.

“ ‘Tuesday, the Eleventh day of December, 1900.

“ ‘255.

“ ‘Estate and Guardianship of WM. SMITH et al.,
Minors.

“ ‘Max Waterman, counsel for guardianship, asked to have his name withdrawn as counsel in the case. N. B. Smith asked to have his name entered as counsel instead of the Max Waterman's. John M. Smith, the guardian of said minors, having made application to the court for an order authorizing him to borrow the funds in his hands belonging to said minors amounting to the sum of about \$82,000 at the rate of three per cent per annum. The court being fully advised in the premises: It is ordered that said guardian be authorized to borrow said sum of \$82,000 at the rate of 3% per annum, and to so hold the same at said interest until the further order of this court.’

[122]

“N. B. testified that he did not procure this order to be made, and did not know of it at the time. He admits in his testimony that he thereafter acted as the attorney for the guardian, and prepared the final account of the latter in which the wards were charged for the money paid by the guardian to the surety company for going on his bond as guardian, and in which also the guardian was charged interest on the money of the wards only from December 11, 1900, and at the rate of three per cent per annum, but claims that, as respects the interest, his doing so was an inadvertent mistake.

“In regard to his guardianship attorney John M.

Smith was *question* and answered as follows:

“ ‘Q. Who was your lawyer in the guardianship matters? A. Waterman for about a year and a half or two years. I forget about it, but Waterman acted as my attorney.

“ ‘Q. Max Waterman, of White Sulphur Springs? A. Yes, he used to assist me about court matters and get the accounts in and accepted. I didn't know anything about the business myself. Badger made out some first of it, and Waterman acted later on, and after that I had N. B. Smith. He was fairly conversant with everything, and I knew he would do the square business by all the parties concerned and so I got him after that—after Waterman.’

“And there is in the record this letter from John M. Smith to Mr. Ramsey, of date October 15, 1900:

“ ‘Martinsdale, Mont., Oct. 15, 1890 (1900)

“ ‘Geo L Ramsey Helena I have sent to the Springs to have N. B. Smith fill out my report as Gardien of Brother William he is my attorney & Keeps My accounts it will be in in a few days as filed in caar.

Yours Treuly

“ ‘J. M. SMITH.’ [123]

“The appellant was but ten years old when the stock was sold, and became eighteen on the 27th of August, 1906. On the 5th of November of the same year her guardian paid her the amount shown to be due her by his final account, which had been approved by the probate court.

“In the deposition of the complainant which was introduced on the trial of the cause, she was asked, among other things, what information she had re-

garding the sale of the stock, when her guardian settled with her in November, 1906, to which interrogatory she answered: 'I knew that the sale had been made, of course, and I knew that uncle John had been the purchaser—that is all I knew. I knew nothing about the stock company or the incorporation of the company. I received my money, and that was all I knew about it—what he gave me.' Being asked what knowledge she had at that time regarding the method, validity and good faith of the sale of the stock, she answered: 'I had no knowledge of its method, its validity, or of its good faith, and knew nothing about their intentions.' In response to the interrogatory, 'What was told you by your uncle, John M. Smith, or your cousin, Napoleon B. Smith, the above-named defendants, about your affairs, and particularly about the sale of said stock?' she answered: 'Nothing was told me by either John M. Smith, or Napoleon B. Smith, concerning the estate in any way—unless I asked directly, and I never talked to "Poly" about my affairs very much, but I have spoken to Uncle John—he always avoided me or would talk in an indirect way, and I knew no more when I finished than when I begun. He didn't seem to care about discussing it very much—he didn't want me to think much about it. I once asked him about the difference between his estate and ours and why he had more than we had and he said, "Papa owed large sums of money when he died, and they had to be paid off." I also spoke about the three per cent [124] which was paid us on our money, and asked him why he didn't give us more—he said,

“It was all he could afford.” “Poly” never told me anything at all, except what we had, and in fact intimating that we ought to be thankful for what we got.’

“Both John M. Smith and N. B. Smith were questioned in respect to conversations they had with the complainant. John M. Smith gave this testimony:

“‘Q. Do you remember when the complainant in this suit came out to the ranch at the time of the settlement? A. I don’t remember the date, but it was in August, I think.

“‘Q. Of what year? A. The 27th of August.

“‘Q. Of what year, I said? A. 1906.

“‘Q. About how long was she there? A. Well, she wasn’t there long. I can’t remember, but it wasn’t but a few days.

“‘Q. What occurred in her matters while she was there? A. N. B. Smith, I think was down there, and was talking about her loaning money. There was a party wanted to borrow the money.

“‘Q. Was there any settlement made with her? A. The settlement wasn’t made at the ranch.

“‘Q. Where was it made? A. At White Sulphur Springs.

“‘Q. Was it made that year? A. Yes, sir. I wasn’t present at the settlement. N. B. Smith done the entire business, he and the court, as I recollect it.

“‘Q. Do you recall any talk when N. B. Smith was down at the ranch and the complainant was down at the ranch, about her affairs? A. I cannot recall just what it was, no. They had some talk, but I cannot—

“ ‘Q. Where did they have it? A. In the office.

“ ‘Q. Who was present? A. I don’t know as I could say exactly who was present. [125]

“ ‘Q. Was the complainant present? A. The complainant was present.

“ ‘Q. Was N. B. Smith present? A. N. B. Smith and myself.

“ ‘Q. Were you present? A. Yes, sir, and I think Mr. Flatt and I think probably my wife was. I don’t know whether she was or not. I know at the time she was there it was talked over, but I can’t recall the conversation.

“ ‘Q. What was talked over—what was it about generally? A. It was talked about what was best for her to do with the money, as near as I can remember.

“ ‘Q. Was there any talk about the matter of your purchase of the stock of the company? A. I don’t remember that that was talked over, but it might have been; I don’t remember.

“ ‘Q. Was there any explanation given her of her matters and how the results and amounts due her were arrived at? A. I think that N. B. Smith gave her full information in regard to it. I think so, as near as I remember, but I cannot recall what it was.’

“N. B. Smith was also questioned in respect to the same matter, and also in respect to a visit of the complainant to Montana in 1904, when she was about sixteen years old, as follows:

“ ‘Q. Do you recall when the plaintiff came out to

Helena in 1904? A. Yes, sir; I recall when she came out here.

“Q. Where did she stop, if she stayed at all in White Sulphur Springs? A. Well, she stopped with us a few days.

“Q. At your home? Yes, sir, at our home.

“Q. With yourself and wife? A. With myself and wife.

“Q. And during that time, was any explanation given to her of these matters about which you have been testifying? A. Yes, sir. [126]

“Q. What was done in that regard, you may tell. A. I showed her the final account of myself as trustee or executor, as in my letter, I invited her to come out here, that was in 1903. I also showed her the annual account. I said I would be glad to explain the affairs of the estate to her, that I was fixing up the annual account as guardian and she was there at the time, and when I was at the courthouse I got the final account and the annual account as executor and showed them to her.

“Q. Where were you when you showed them to her? A. I was there in my office at the little room at the north—there is two rooms to the office.

“You said as you had invited her in your letter? A. Yes, sir, in my letter I had invited her.

“Q. What letter did you refer to, the one of August 13, 1903, that is in evidence here? A. August 13, 1903.

“Q. In connection with the explanation of the papers in question, did you say anything to her about it, or what did you say? A. Oh, I explained

to her about the sale of the property.

“ ‘Q. As you have—

“ ‘WITNESS (Continuing).—I explained to her about the sale of the property and the items of the account.

“ ‘Q. Did you tell her the facts about these matters as you have told them here? A. I related the facts to her about the sale and why I sold the property.

“ ‘Q. Well, did you give her information the same as you now tell the matter, or definitely? A. Well, the same information—probably I didn’t go into it quite as fully, but I explained generally the nature of the transaction and why I sold it, and what I got for it, and showed her the accounts. [127]

“ ‘Q. Do you remember, in 1906, when the complainant came out to Montana? A. Yes, sir.

“ ‘Q. Did you see her at that time? A. Yes, sir.

“ ‘Where? A. I saw her down at the ranch of Smith Bros. Sheep Company.

“ ‘Q. What was she doing down there? A. She had, I think, come back from Germany if I remember correctly, and was going back.

“ ‘Q. Well, that states where she came from and where she was going to, but I asked you if you knew what she was doing down there on the ranch? What she was there for. A. Well, she was there, looking after her estate. I don’t remember whether the final account had been put in or not, but we discussed the matter there in our presence there in the office.

“ ‘In the office, where do you mean? A. The office of Smith Bros. Sheep Company.

“ ‘Q. Who discussed it? A. Well, I discussed it with her and Uncle John.

“ ‘Who was present? A. Mr. Flatt was present.

“ ‘Q. And you discussed what matter? A. Oh, about the sale of the property, and how it had been handled, and how we had tried to manage the property for her.’

“In the same connection a letter written by N. B. Smith to the complainant’s younger sister on the 7th of April, 1905, is pertinent:

“ ‘N. B. Smith, County Attorney, Meagher County.

“ ‘White Sulphur Springs,

April 7th, 1805.

“ ‘Dear Anna: Your favor of the 4th inst. came to hand. Will say presume you have my letter inclosing the \$500. Yes, you will get your money in June. You need be at no expense about attorney’s fees. I would like to have you come out and be here when the estate is settled. You can go over all the [128] accounts with me and see where the money has gone. I have taken receipts for everything and have paid out all money by checks. I want you to know everything and then I will feel that I have done my duty. . . .

“ ‘Your cousin,

“ ‘N. B. SMITH.’ ”

John M. Smith, as guardian, settled his final account with the plaintiff on the same basis employed in settlement with Nellie Mae Moore, to wit, three per cent interest on the principal sum held by him from December 11, 1900. The net amount received by the plaintiff was \$23,954.01. The initial amount

accounted for was one-third of \$82,170.20, or \$27,-290.06. The complaint charges that the sale was "illegal, fraudulent and collusive," and that "Napoleon B. Smith and John M. Smith colluded and confederated to secure the said property to the said John M. Smith, and to sell the same to him at much less than its real value." The claim that the property was sold at less than its then present value was virtually abandoned by the appellant in this court, and, indeed, such a contention cannot be justified in the evidence. The United States Circuit Court of Appeals decided that "the sale of the stock of the estate of the deceased Wm. A. Smith and the subsequent misappropriation of the money of the minors by their guardian were parts and parcels of a scheme entered into by and between N. B. Smith and John M. Smith, which was a fraud upon the minors and the probate (district) court." Judge Hunt, who tried the Moore case in the federal district court, and Judge Stewart, who heard this case in the Meagher County District Court, were of opposite opinion; that is to say, in their judgment there was no fraud, collusion or conspiracy, and the sale was in all respects legal, regular and free from fraud.

[129]

The additional testimony given by plaintiff in the State court was, in part, as follows: "I became twenty-one in 1906; had attended school in Missoula, at Shattuck Military School and at Notre Dame; had had no business experience; the settlement between myself and my uncle was transacted by myself, N. B. Smith and Mr. Flatt; Mr. Flatt gave me

a check at the ranch for a part of the money and I think N. B. Smith gave me part of it; I saw the expense account and what the money was supposed to have been spent for; I did not question it further than this, that I asked what certain accounts were for, and any account that I happened to pick out and see I would ask what it was. Q. Now, Mr. Smith, what, if anything, did you know at that time in relation to the circumstances and conditions under which your uncle, John M. Smith, became the apparent owner of the stock that had formerly been owned by your father in the Smith Bros. Sheep Company? A. Nothing at all, but one thing I asked my uncle John while on the ranch—I asked him why it was that our property was sold, and he said that he did not feel that he wanted us children to take a chance, so he bought the property. I knew nothing of the fact that the money that was turned over to him he used to pay off his notes at the bank; knew nothing of his purpose to have himself appointed guardian so that he might utilize the money to pay off the notes at the bank; *knew nothing of his purpose to have himself appointed guardian so that he might utilize the money to pay off the notes.* I knew nothing of the affidavit presented to the court that the purpose was to sell the stock of John M. Smith in conjunction with the stock of the estate in order that the best price might be realized for it, or that John M. Smith had gotten \$13,000 in two years after father's death, while the executor of father's estate only procured about \$800. Mr. N. B. Smith told Mrs. Reynolds and she told me that father's stock

[130] had been sold to my uncle." The inventory value of the stock in the Smith Bros. Sheep Company belonging to the estate of Wm. A. Smith, deceased, was \$61,475.

We approach the final determination of the case with the greatest respect for the decision of the learned judges of the Circuit Court of Appeals. Nevertheless, it is our duty to decide it in conformity with the dictates of our own consciences. In so doing we first consider the situation and characters of the persons accused of having formed a conspiracy to defraud the plaintiff; for unless such conspiracy existed, the conduct of the parties subsequent to the sale becomes altogether immaterial. The principal actor in the alleged plot is John M. Smith, a man sixty-four years of age, of comparative wealth, in poor health, who, whatever motive may have actuated his later conduct, appears beyond a doubt to have been sincerely desirous of disposing of his interests in the sheep business and retiring from active participation in industrial pursuits, at the beginning of the negotiations for the sale of the corporate assets. This man, who is now accused of so unnatural a purpose to overreach and defraud his brother's orphan children, had been intimately associated with that brother for many years prior to his death. They lived in a sparsely settled community; John, at least, was illiterate; but by their personal efforts and attention to business, they had succeeded in accumulating a considerable fortune. John, on account of the exposure incident to the conduct and management of a large sheep ranch, had contracted

a disease which necessitated his spending the winters in California. He died pending this litigation. It is not unnatural to assume from a contemplation of his life and its environments that he was provincial in his habits and ideas; that the spirit of thrift and a desire to save characterized his conduct and dictated his actions [131] generally. This is constantly to be borne in mind in passing judgment upon the facts in the case and the successive steps taken looking to a disposition of the property of the parties. It is not unreasonable to assume, from their relationship and association, that some considerable degree of affection existed between the brothers. John was present at the death of William, and the latter's last words were a request that John would look after the interests of his children. The promise was given and John testified that it had been faithfully kept. It is impossible to read the correspondence of this uneducated man with his nephew N. B. Smith, and thereafter entertain a doubt that, in the beginning at least, he entertained a sincere regard for the plaintiff and his sisters, was actuated by the highest motives of solicitude for their welfare and a desire to protect and conserve their inheritance. Although he held a controlling interest in the stock of the corporation, he was reluctant to sell his portion alone, for fear the minority interests of the children would suffer if strangers acquired his stock, and in giving an option to McNaught he stipulated that it should be subject to the approval of the executor of his brother's estate. It must not be forgotten, either, that the corporation was a sort of family

affair; and the record tends to show that no particular surprise was caused by the fact that John M. Smith was in the habit of drawing from its funds such moneys as he had occasion to require. The books of the concern were kept in a very informal and careless manner. In all probability the brothers had that trust and confidence in each other which was engendered and justified among those whose sturdy characters and integrity of purpose alone made it possible for the early settlers to go into the remote regions of the State and by hard labor and mutual dependence build homes for themselves and develop the natural resources of the country. [132]

The other alleged conspirator is Napoleon B. Smith, now and for many years a member of the bar of this court in good standing; a man of family, whose character for truth, honesty and integrity generally is unimpeachable, so far as the record discloses.

The property in controversy consisted of stock in the Smith Bros. Sheep Company, of the appraised value of \$61,475, which Judge Armstrong, presiding in the District Court of Meagher County at the time, authorized the executor to sell for \$75,000 at private sale, and which actually sold for \$85,000. Several *bona fide* efforts had been made to effect a sale of the whole plant, without success. Touching the value of the stock held by the executor, he testified that he figured \$75,000 was what it was worth; that he had counseled with Mr. Anderson, Dr. Parberry, Perry Moore and Len Lewis, representative sheep men of the county, and they advised him to sell if

he could get a fair price, which, in their judgment, would be \$150,000 to \$160,000 for the whole property.

Regarding the method pursued in the probate proceedings growing out of the administration and guardianship matters shown by the records, it is well to note that White Sulphur Springs, the county seat of Meagher County, was at that time a village of about 450 inhabitants, situated many miles from a railroad; court was held four times a year, and it is well known to the profession that probate matters were sometimes loosely conducted in those remote country districts, and the people generally regarded the district judge as a repository for all their troubles growing out of the administration of estates, and did not hesitate to seek his counsel and advice wherever they could encounter him and in the most informal manner.

Coming now to the correspondence which is claimed to disclose the conspiracy: As was well said by Judge Ross, who prepared [133] the opinion of the Circuit Court of Appeals: "A sale by John M. Smith of his majority of the stock to a stranger might have worked to the injury of the minority interest of the children of the deceased William A. Smith, so that both John M. Smith and the executor became desirous that both interests should be sold together." The executor, therefore, indorsed upon the option to McNaught an agreement to immediately make application to the District Court to sell the interest of the estate in the property at the rate therein named, in case a buyer could be

found. At that time, however, as is also noted in the opinion of the court of appeals, the evidence shows that the executor regarded the estimate of John M. Smith as to the value of the property as too high, as did others. Under date of December 14, 1897, John M. Smith informed the executor, by letter (we shall not attempt to reproduce his spelling), that he wanted to sell out "so as to go some place that I can be with my family and can send Stanley (his son) to school, as long as I hold it I can't be satisfied away from it and I don't want to sell out and leave the children's interest in it I think the coming year will be the time to let go of the entire plant you can at the next term get a permit to sell Wills interest at any time that we can get a fair value for it." He also declared that if he were young he would not care to sell. The executor thereupon, on January 24, 1898, obtained from the District Court an order to sell the property for \$75,000, which was \$13,525 more than its appraised valuation. There is no indication in this transaction that the executor had any notion of selling the property for less than it was worth, or, indeed, that he intended to sell it to Mr. John Smith. On March 19, 1898, John M. Smith asked the executor to name the least price he would accept for the children's stock, saying he [134] understood the latter had authority to sell for \$75,000, but that he thought they could do better than that and get them \$80,000 or \$85,000 clear. Bearing in mind that John M. Smith held his stock at a higher valuation than did the executor that of the children, it is not unreasonable to conclude that

he acted in good faith in naming a minimum price, so that the former might have a "margin to work on." On March 25, 1898, the executor expressed a reluctance to "see a sale go by," and indicated a willingness to take \$85,000 for the interest of the estate. He said: "I want to do what is fair by the estate and also by you. I want to see a sale go through in some shape, but at the same time I want to do the best I can for the estate." It does not seem possible that these men would take the trouble to express such sentiments in private correspondence if they were engaged in a conspiracy to defraud their minor relatives. On July 2, 1898, John M. Smith very frankly told the executor that their judgment differed as to the value of the property, and that he would not be satisfied with the same amount received by the estate. He then attempted to induce the executor to take less than \$85,000. In our opinion these negotiations disclose no concert of action or meeting of minds between these two men. On December 30, 1898, Henry Neill made a cash offer of \$80,000 for the stock of the estate. On the next day the executor informed his uncle, by letter, of this offer. In the course of the letter he said: "I am very anxious to do something with the property, as I feel that the estate is going to lose money by holding it. If you will make me a cash offer of \$85,000 you can have the property. I told Neill I would not make such an offer. McNaught writes me that you owe the company \$13,839.35. If you do not take the stock it would be your duty to put your note into the company for the amount. Under our law the

only way money can be drawn out of [135] a company by a stockholder is by declaring so much dividend on each share of stock. I do not make the suggestion to hurt your feelings, but you know yourself that such large transaction should not be carried on in such a loose way." It is suggested by the appellant that the expression, "I told Neill I would not make such an offer," discloses some secret understanding between the nephew and uncle at this time. We do not know exactly what was intended by N. B. Smith, but it is fair to presume that if he got his price,—what he thought the property of the estate was actually worth,—he would naturally prefer a relative to a stranger as a purchaser, provided the former wanted to buy. Or it may be said that the only meaning of the words was that the executor told Neill he would not give him an option on the estate's holdings. If Neill had offered more than \$85,000 it might be contended that the executor was willing to sell to his uncle at a lesser price, but there is not any testimony to justify such a conclusion. It will be observed, also, that in the letter the executor respectfully, but firmly, called upon his uncle to pay his indebtedness to the company, which is altogether at variance with the idea that they were conspiring to defraud the children. Note, also, that at this time John M. Smith was endeavoring to obtain an option so that he might dispose of the whole property to some third person, and also that the price of \$85,000 had been fixed many months prior to the offer of Neill.

What relation did John M. Smith and Napoleon B.

Smith bear to the Union Bank & Trust Company and Mr. Ramsey, its President, at this time? Substantially none, so far as the record shows, save that John M. Smith was very friendly with Henry Klein the Vice-president of the bank. The first account opened with the bank was on April 11, 1898, by the Smith Bros. Sheep Company [136] depositing \$2,000. John M. Smith's account was opened April 27, 1899, by a deposit of \$75,000. Yet on January 14, 1899, we find John M. Smith openly and frankly informing Mr. Ramsey in a letter that he was about to buy the estate's interest in the stock of the sheep company and asking if the bank would loan \$90,000 on the entire stock. This letter also indicated that at that time he had a mind to sell the entire property at the first opportunity and thought he could make a sale in four or five months. On January 16, 1898, John M. Smith wrote to the executor saying that he had wired an acceptance of his offer to take \$85,000 for the stock belonging to the estate, stating also, "If Miles makes a raise I will pay you the \$90,000 that you ask you of course would put it in government bonds if you had it now to make things safe and you be absolutely safe I will give you all of the sheep company stock to hold as security and I will pay the same interest that you would get on government bonds and pay you 3 times per year until I can sell out to advantage then you will be safe and if any one is loser it will be me and I am willing to take the chances there never will be a time but what the whole business will be the best of security for that amount but I don't intend to hold it very

long at any time that I can make a good sale I will pay off your \$85,000. I think this the best way for us to close up business you can get up the papers so you are safe and at the same time give me a chance to handle myself to advantage if Miles fails if you did have to pay taxes I will agree to pay it for you so it will leave it just the same as government bonds I could borrow the money of the bank at Helena by giving the same security but I would sooner deal with you and you are just as safe as though you had government bonds." To this letter N. B. Smith replied on January 16: "I want a clear understanding [137] with you so that there may be no hereafter in the matter. It is understood that I am to get \$85,000 for the stock and the estate is to have that and not owe the company anything. You had better pay a portion down." On January 22 John M. Smith inquired, by letter, how much the executor wanted him to pay down and what interest he would want on the balance. He also said that in his judgment it would not take longer than May the first to make "some turn so I will get the balance for you." On January 21 John M. Smith was informed by Mr. Ramsey that he could borrow \$90,000 at 9% interest. On January 24 the executor wrote to his uncle in part as follows: "I cannot sell the way you indicated. The only way I can sell is for cash down. If you are appointed guardian of the children then I could turn the money over to you. As I told you all the time I have no right to sell on credit." But on January 20 the executor wrote the so-called "lost letter," which is thought by the appellant to have mapped

out a fraudulent scheme to defraud him and his sisters. It really makes very little difference who first proposed the plan. There does not appear to have been anything secret about it. John M. Smith sent the "lost" letter to Ramsey, who read and returned it. On January 27th John M. Smith wrote to the executor: "I think your plan good. I will take steps to get the ten thousand down payment and we will proceed to business at once. I will write to the bank and arrange for the money if you have me appointed guardian for the children as soon as I sell out I want to invest in government bonds all their money and also my own as I don't intend to try to do any business after I sell out and I fully intend to let go this spring I think your suggestion a good one. I think I should have the children come out here the schools is first class and the climate is good also good society." [138]

It would serve no useful purpose to again quote any substantial portion of the correspondence. It is very clear to us (1) that neither John M. Smith nor Napoleon B. Smith ever had any intention or design to defraud the children or to gain any advantage over them. Indeed, in our opinion, all of their correspondence and actions indicate a most praiseworthy solicitude for their material welfare. (2) The property was sold for its full market value and the children suffered no detriment whatsoever on account of the sale. We believe that both John M. Smith and Napoleon B. Smith acted with the utmost good faith in the premises, that they exercised sound judgment as to the affairs of the children, and

constantly had in mind the fact that they were dealing with a trust estate and ought not to jeopardize it by taking any chances of its being diminished or lost while in their care. With this in mind it naturally occurred to them that an investment in government bonds was perhaps the safest that could be made. At least they appear to have had such an ultimate investment constantly in mind. (3) We think it equally clear that neither of these parties at any time pending negotiations for the sale, or at the time of the sale, had any idea that John M. Smith should buy the property as a speculation or as a permanent investment. We cannot read their correspondence or contemplate their actions and hold the opinion that either of them ever entertained any other notion than that John M. Smith, after becoming sole owner, should dispose of the entire plant at the earliest opportunity, and, if possible, within a very few months after the sale. We think the correspondence shows, also, that they were dealing with each other at arm's-length, and we find no evidence that N. B. Smith was dominated by his uncle or influenced by him to do any act inimical to the interests of the children. It is very easy to select a fragment of one letter here, and another there, [139] and by patching them together draw a partisan conclusion, altogether variant from the intentions and sentiments of the writers. We do not think that any of the main deductions of fact drawn by the appellant are justified in the evidence. We are also of opinion that John M. Smith's frank and repeated assertion that in his judgment the property was of greater

value than that at which the executor estimated it, in itself shows good faith on his part. (4) Neither have we any doubt that John M. Smith was honestly of the opinion that, considering the large undertaking he would be required to give, and which he eventually did give, for the faithful performance of his duties as guardian, together with his individual responsibility, and the further fact that the entire property would be speedily disposed of and the proceeds invested in government bonds, it was a perfectly legitimate transaction to employ the guardianship funds temporarily to take up the indebtedness to the Union Bank & Trust Company and thus avoid the payment of so large a rate of interest as nine per cent per annum on the sum of over \$80,000. He testified that he thought he had a right to turn in the certificates in payment of his notes because he had given security; that he understood he was using money that was turned over to him as guardian, but thought he had a right to do so, as he had given security; because "it was the same as though it was in my possession." He very frankly stated that he might have made a mistake, but that he did not do so with intent to defraud anyone, and if he had wronged anybody he was willing to make it right. He said he thought it was just the same as if he put it in Government bonds if he paid the interest. We cannot believe that this old man was engaged in a fraudulent conspiracy to defraud his brother's [140] orphan children. Moreover, the facts show that they have not been defrauded. Their property was sold to the only purchaser who could be found

who was willing to give as much as \$85,000, the full value thereof; and that sum, after deducting expenses of administration, had been fully paid to them. It may be that upon settlement of the guardian's accounts he should have been required to pay a greater rate of interest and for a longer period of time, than was actually required of him, but that question is not before us; and even if it should be answered in the affirmative, the fact cannot by relation characterize as fraudulent and void prior transactions which were in themselves honest and free from actual fraud.

But it is contended that the plan adopted by John M. Smith of using the guardianship funds to take up his personal indebtedness to the bank was fraudulent and void as a matter of law. In this connection it may be well to note that aside from the question of the rate of interest that should have been exacted from John M. Smith as guardian, the equities of the case are all with the respondents. The appellant is attempting, in a court of equity, to overturn and set aside a purchase of property sold in good faith, for its full value, every dollar of which has been accounted for, because, as he claims, his guardian used his money for a short time, in order to effect the purchase. In fact, this consideration is of no moment whatsoever, so far as the result to the appellant is concerned. Not any of his property was embezzled or withheld. All of it was duly and regularly accounted for when he became of age, and turned over to him. During the latter years of his minority he took no chances of the sheep industry

being affected by adverse legislation; he was fully protected from loss; if John M. Smith had continued to pay interest on the amount temporarily borrowed from the bank and had allowed the guardianship funds [141] to lie idle, or if he had sold out the entire holdings of the sheep company, as contemplated, the result to the appellant would have been exactly the same as that brought about by the course of procedure actually adopted. If the appellant had been defrauded in fact, or if he had lost anything by reason of the methods pursued by his guardian, he would be in an altogether different situation; but such is not the case.

It is claimed by the learned counsel for the appellant that in the circumstances disclosed by the record, John M. Smith was (2) guilty of larceny under the provisions of section 8656, Revised Codes, which are as follows: "Every person acting as . . . guardian . . . who secretes, withholds or otherwise appropriates to his own use . . . any money . . . in his possession or custody, by virtue of his office, employment or appointment, is guilty of larceny." This section has no bearing upon the case disclosed by the record. Smith did not secrete or withhold the money of his wards. They were in nowise aggrieved by his method of procedure. Even if we assume that he was not justified in using the funds as he did, and that he thereby technically appropriated them to his own use, yet we must look to the ultimate result of his actions in order to correctly judge of the effect thereof upon the instant controversy. It is impossible for us to

believe that a guardian who had given ample security to account for all funds coming into his hands, who was personally able to raise the amount thereof on demand, who sincerely believed that he was acting legally and for the best interests of his wards, and who did, in fact, fully account for all moneys paid over to him, should or could be adjudged guilty of a heinous crime in a subsequent suit by one who has not lost or suffered by his conduct.

The particular infirmity in the case of the plaintiff is that he is attempting to avoid the sale for a purely technical [142] reason; a reason based in facts arising after the sale was complete, and which had no effect whatsoever upon the sale itself. It is claimed that this may be done because the whole course of action was fraudulent and therefore void; that the subsequent use of his money, pursuant to a prior design to so employ it, vitiated the sale therefore made. But his premises are defective. Not any fraud in fact was contemplated or practiced in any part of the proceedings; at most a mistake was made by the guardian as to his right to so use the money; and a technical violation of duty on his part may not now be employed to overturn a transaction otherwise regular and legal, by which no one had suffered any injury.

Two very elaborate and able briefs have been submitted by counsel for the appellant. Numerous decided cases are therein cited, all of which we have examined with painstaking care, but not any of which, in our judgment, deal with the exact question here involved. It is contended that equity must

frown upon such a proceeding as that disclosed by this record, because it has a tendency to "despoil the weak wards of chancery, even though in the individual case it may have been entered upon with the most praiseworthy motives and a fair and even liberal consideration for the property was paid." But we conceive that a court of equity, while constantly bearing in mind the beneficent fundamental principles of its jurisprudence, should carefully and conscientiously examine and decide each case upon the particular facts therein disclosed, with a view to doing substantial justice by the immediate litigants, lest in applying a hard-and-fast rule to all cases alike, injustice may be done to the parties then claiming the attention of the Court. We find no occasion to unduly lengthen this opinion by a review of the cases cited. [143]

In addition to the basic question heretofore considered, several technical points of law are advanced in behalf of the appellant and elaborately argued. Some of them are incidentally disposed of by what has already been said; the others have no merit, in our judgment. The facts of the case are against the appellant.

The judgment and order are affirmed.

Affirmed.

Mr. Chief Justice Brantly and Mr. Justice Holloway concur.

[Excerpt from Appellant's Brief in Supreme Court, Montana, in Smith vs. Smith, etc.]

That in their brief, submitted to the Court on behalf of defendant in this cause counsel for defendant

referred to and submitted to the Court, the following from Appellant's Brief on Appeal, in said cause of *Smith vs. Smith*. From page 43 the following:

"As shown heretofore, he got back as John M.'s attorney in the guardianship proceedings at the first opportunity, got for him the order permitting him to borrow the money of the estate at three per cent though he must have known, as a lawyer, that the order had not the semblance of validity about it effective to condone his previous misappropriations, and as attorney for John M. he prepared the account of the latter as guardian in which he was exonerated altogether from the payment of interest on the guardianship funds down to December 11, 1900, when the famous 'order' was obtained, and was charged only three per cent thereafter."

From page 74, the following:

"It is elemental that a trustee cannot loan the trust funds to himself with or without security.

1 Perry on Trusts, 453, 461.

In re Petrie, 5 Dem. Sur. 352.

In re Jones, 10 N. Y. St. 176."

From page 106 the following:

"Nor that the order permitting John M. to borrow the funds of the estate would not operate retroactively, even if it had any validity at all, to legalize his former misappropriations.

[144]

Hendlee vs. Cleaveland, 55 Vt. 142.

Nor that no attention can be paid to any testi-

mony about any private talks with the judge about the matter."

Also appellant's assignment of error No. 14, page 60, in their brief, which is as follows:

"It was error in the Court not to hold and find, and to decree accordingly, that under any circumstances the defendant John M. Smith and his successor in interest should account to the appellant for the full value of the use of the money of the appellant, at the current rates of interest charged by banks during the time that he had the use of such money."

[Excerpt from Appellant's Petition for Rehearing in Smith vs. Smith, etc., in Supreme Court, Montana.]

From appellant's petition for Rehearing in said cause, p. 23, the following:

"Without further elaboration, the Court will see that it must denounce as wholly idle any effort to give countenance to the use by a guardian of his ward's funds, by the procurement of any order authorizing him to borrow them, whether it be made before or after he has actually used the funds.

The statute is to be construed in view of the universal rule that the guardian cannot 'borrow' his ward's funds and that if he makes use of them upon any pretence of a loan, it is a conversion of the trust estate."

Also the following from pages 32 to 33:

"It is insisted that equity and justice demanded that he pay just what he would have

been obliged to pay any one else,—namely, nine per cent.

Unquestionably either that rate or the legal rate should be made the basis of computation unless the order fixing the rate at three per cent. is valid. That it is not, is indubitable upon the authorities referred to.”

“Dismissing, then, the order, the prevailing rate of interest, certainly nothing less than the legal rate, must be exacted. And the rule is universal that when the trustee uses the trust funds annual rests must be made in the accounting with him.”

[Excerpt from Respondent's Brief in Smith vs. Smith, etc., in Supreme Court, Montana.]

Counsel for defendant cited and submitted to the Court the following from pages 106 and 107, of Respondent's Brief on Appeal in said case of Smith vs. Smith:

“It is not denied that the Court or Judge had the power to authorize the investment or borrowing of the moneys.”

Section 3015, Code of Civil Procedure, provides:

[145]

“The Court, on the application of a guardian,
 . . . may authorize and require the guardian
to invest the proceeds of sale, or any other of
his ward's moneys, in his hands, in real estate
or in any other manner most to the interest of
all concerned therein; and the court or judge
may make such other orders and give such direc-
tions as are needful for the management, invest-

ment and disposition of the estate and effects, as circumstances require."

"Sections 2957 and 2982 clearly contemplate the earning of interest on funds. And had there been a formal court order made on June 14, 1899, when John M. received the moneys as guardian, authorizing him to borrow them, instead of an informal talk with the Judge about that time, the proceeding would have been regular and in all respects in accordance with statute, and it could not have been said that the money was even wrongfully, much less criminally or fraudulently used."

Defendant's Exhibit "A" [Decree of Settling of Final Account of Guardian and Distribution to Ward of His Share of the Estate, in the Matter of the Estate and Guardianship of William Smith, Minor, in District Court, County of Meagher, Montana].

DEFENDANT'S EXHIBIT "A," PUT IN EVIDENCE BY DEFENDANT.

In the District Court of the Tenth Judicial District of the State of Montana, in and for the County of Meagher.

In the Matter of the Estate and Guardianship of
WILLIAM SMITH, Minor.

DECREE OF SETTLEMENT OF FINAL ACCOUNT OF GUARDIAN, AND DISTRIBUTION TO WARD OF HIS SHARE OF ESTATE.

John M. Smith, the guardian of William Smith,

minor, having on the 1st day of December, A. D. 1906, rendered and presented for settlement and filed in this court his final account of his guardianship of the estate of said ward, and said guardian having also filed in this court a petition, setting forth among other matters that said ward, William Smith, was of age in the month of October, A. D. 1906, and was twenty-one years of age, and that his guardianship of said ward should be terminated, and that the shares of said ward in certain real and personal property should be distributed to said ward, and said matter coming on regularly to be heard, on this 14th day of December, A. D. 1906.

Upon satisfactory proof of the due posting of notice of said hearing for ten days before said 14th day of December, A. D. 1906, as directed by this Court, the said guardian appearing by his counsel, N. B. Smith, Esq., the Court proceeded to the hearing of said petition; and it duly appearing to the Court, after having fully examined said account and the vouchers produced in support thereof, that said account contains a just and full account of all moneys received and disbursed by said guardian from the commencement of his guardianship to the 30th day of November, A. D. 1906, both dates inclusive; that all necessary and proper vouchers were [147] filed and produced herein; that the total amount received by said guardian as such is \$32,918.57, and the full amount expended \$8,954.56, leaving a balance of \$23,954.01, and that said account is entitled to be allowed and approved; and it appearing to the satisfaction of the Court that the shares of said ward in

certain real and personal property should be distributed to said ward; and it duly appearing to said Court that since the rendition of said final account no moneys have been received or distributed or disbursed by said guardian on account of said ward, William Smith; that said ward, William Smith, is entitled to receive from said John M. Smith, his guardian, the sum of \$23,954.01, being the balance remaining in his hands as such guardian on settlement of said final account; and all and singular the law and the premises being by the Court seen, heard, understood and fully considered, whereupon,

It is here Adjudged and Decreed, that all the acts and proceedings of said John M. Smith, guardian as aforesaid, as appearing upon the records hereof, be and the same are, hereby approved and confirmed, and the said guardian is hereby directed to pay over to his said ward, William Smith, the said sum of \$23,954.01, being the balance remaining in his hands after the settlement of his final account, taking the receipt of said ward therefor.

It is further Ordered, Adjudged and Decreed, that of the real and personal property of said ward William Smith, exclusive of the money aforesaid, there be distributed to said ward, William Smith, the property affected by this decree, as follows, viz.:

5 5/6 Shares of the Capital Stock of the First National Bank, of White Sulphur Springs, Montana.

62,500 Shares of the Capital Stock of the Black Hawk Mining Company.

63,500 Shares of the Capital Stock of the Alice Mining Company.

An undivided one-sixth interest in eight town lots in Higgins [148] Townsite of the Town of White Sulphur Springs, Montana, being Lots 20 and 21 in Block 22; and Lots 1, 2 and 3 in Block 30; and Lots 13, 14 and 15 in Block 11.

An undivided one-sixth interest in two town lots, in Park Addition to the City of Livingston, Montana, being Lots 8 and 25 in Block 22, according to the plat filed in the office of the Recorder of Deeds in Gallatin County, Montana.

Done in open Court this 14th day of December, 1906.

E. K. CHEADLE,

Judge of the District Court.

[Endorsed]: Certified Copy No. 255. In the District Court of the Tenth Judicial District of the State of Montana, in and for the County of Meagher. In the Matter of the Estate and Guardianship of William Smith, Minor. Decree of Settlement of Final Account, and Distribution to Ward of His Share of Estate. N. B. Smith, Attorney for John M. Smith, Guardian. Filed this 14th day of December, A. D. 1906. A. C. Grande, Clerk. Recorded in Book 18 of Orders and Decrees, pages 362-3-4. [149]

No. 5. ~~Wm. Smith vs. Mary M. Smith. Executrix.~~
~~Deft's. Ex. "A."~~ Filed Jan. 16, 1914. ~~Geo. W.~~
~~Sproule, Clerk. By C. R. Garlow, Deputy.~~
State of Montana,
County of Meagher,—ss.

I, F. H. Mayne, Clerk of the District Court of the Fourteenth Judicial District of the State of Montana,

in and for the County of Meagher, do hereby certify that the foregoing is a full, true and correct copy of the original "Decree of Settlement of Final Account, and Distribution to Ward of His Share of Estate," in the matter of the estate and guardianship of William Smith, minor, with the endorsements thereon, remaining on file in this office.

Witness my hand and the seal of said court this 31st day of July, 1913.

[Seal]

F. H. MAYN,
Clerk.

No. 5. Wm. Smith vs. Mary M. Smith, Executrix. Defts. Ex. "A." Filed Jan. 16, 1914. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy. [150]

Defendant's Exhibit "B" [Decree of Final Discharge, in the Matter of the Estate and Guardianship of William Smith, Minor, in District Court, County of Meagher, Montana].

DEFENDANT'S EXHIBIT "B," PUT IN EVIDENCE BY DEFENDANT.

In the District Court of the Tenth Judicial District of the State of Montana, in and for the County of Meagher.

In the Matter of the Estate and Guardianship of
WILLIAM SMITH,

Minor.

It appearing that said estate and guardianship has been fully administered, and it being shown by the guardian thereof, by the production of satisfactory vouchers, that said guardian has paid all sums of

money due from him, and delivered up under the order of the Court all the property of the estate of the party entitled and performed all acts lawfully required of him.

It is ordered, adjudged and decreed that said guardian, John M. Smith, and his sureties be and they are hereby released and discharged from all liability to be hereafter incurred; that said estate is fully distributed, and the trust settled and closed.

Dated this 27th day of December, 1906.

E. K. CHEADLE,

Judge of the District Court.

State of Montana,

County of Meagher,—ss.

I, F. H. Mayn, Clerk of the District Court of the Fourteenth Judicial District, State of Montana, in and for the County of Meagher, do hereby certify that the foregoing is a full, true and correct copy of the original "Decree of Final Discharge" in the Matter of the Estate and Guardianship of William Smith, Minor, with the endorsements thereon, remaining on file in this office. [151]

Witness my hand and the seal of said Court, this 31st day of July, 1913.

[Seal]

F. H. MAYN,

Clerk.

[Endorsed]: No. 255. District Court, Tenth Judicial District, Meagher County, Montana. In the Matter of the Estate and Guardianship of William Smith, Minor. Decree of Final Discharge. Filed this 27th day of December, 1906. A. C. Grande, Clerk. N. B. Smith, Attorney for John M. Smith,

Guardian. Recorded in Orders and Decrees 18, page 368. No. 5. Wm. Smith vs. Mary M. Smith. [152] Deft's Ex. "B." Filed Jan. 16, 1914. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy. [153] (Title of Court and Cause.)

STIPULATION.

It is hereby stipulated and agreed by and between the counsel for the parties above named that on the trial of said cause plaintiff offered in evidence the following portions of the printed record on appeal to the Supreme Court of the State of Montana, in the case of William Smith, Plaintiff, vs. Mary M. Smith, as Executrix et al., Defendants:

Testimony of John M. Smith from line 18, page 516 to line 17, on page 518; also statements of John M. Smith found on page 570, beginning with line 24 down to and including pages 571, 572, 573 and 574.

Testimony of N. B. Smith beginning at line 28 on page 795, down to line 10, page 798; also from line 30, page 799, down to line 26 on page 802; also the judgment-roll and the decision of the Circuit Court of Appeals for the Ninth Circuit, in the case of Nellie Mae Moore vs. John M. Smith et al., defendants.

Also pages 126-127, and 128, of appellant's brief in chief in the case of William J. Smith vs. Mary M. Smith in the State Supreme Court; also part of respondent's brief in the same matter, beginning with the paragraph entitled: "Accounting for [146] Interest," in page 196 and continuing on page 197 thereof; also part of brief on petition for rehearing, beginning third line from the bottom of page 31 to page 38, inclusive; also that part of the brief of re-

spondent in reply to the petition for rehearing which dealt with the matter of interest.

Certified copy of abstract from Probate Register for the year 1900, of the District Court of Meagher County, Montana.

And that in this cause in their reply brief, counsel for plaintiff referred to the statement of John M. Smith from line 6, page 539 to line 20, page 540, of the Record on Appeal in the state court of William J. Smith vs. Mary M. Smith et al.

That on the trial of the above-entitled cause, counsel for defendant offered in evidence the judgment-roll contained in the printed record on appeal in said case of Smith vs. Smith; also the opinion of the Supreme Court of the State of Montana, rendered in said cause and reported in 45 Montana Reports, pages 535-582, inclusive; also evidence of William J. Smith, pages 1340 to 1357, of record in case of Smith vs. Smith.

That in their brief, submitted to the Court on behalf of defendant, in this cause, counsel for defendant referred to, cited and submitted to the Court, pages 24, 25, 43, 71-75, 105-6, 113, 124-128, of appellant's brief on appeal in said cause of Smith vs. Smith; and to appellant's assignment of error, number 14, page 60, of said brief of appellant.

To pages 2, 5, 6, 7, 8, 14, 16, 17, 19, 20-24, 25, 27, 31, 32 and 38 of appellant's petition for a rehearing in said cause.

Also pages 106-7 and pages 196 and 197, of respondent's brief on appeal in said cause.

It is hereby stipulated and agreed that the Court

in deciding this cause, had before it, and that the evidence above referred to, together with those portions of the briefs [154] designated herein may be incorporated in and form a part of the statement of the case and record on appeal in this cause, as well as any other evidence admitted by the Court upon the trial.

C. B. NOLAN,

WM. SCALLON,

Counsel for Plaintiff.

R. LEE WORD,

H. G. & S. H. McINTIRE,

Counsel for Defendant.

Filed March 28th, 1914.

The foregoing statement, being true, complete and properly prepared, is hereby approved this 22 day of April, 1914.

GEO. M. BOURQUIN,

Judge.

[Endorsed]: Title of Court and Cause. Statement of Evidence to be Included in Record on Appeal. Filed April 22, 1914. Geo. W. Sproule, Clerk. [155]

That on the 7th day of February, 1914, the Opinion of the Court was duly rendered and filed herein, being in the words and figures following, to wit: [156]

[Opinion.]

*In the District Court of the United States, in and for
the District of Montana.*

No. 5.

WILLIAM SMITH,

Complainant,

vs.

MARY M. SMITH, as Executrix of the Will of
JOHN M. SMITH, Deceased,

Defendant.

This is a suit by a former ward against the executrix of the will of his deceased guardian. The bill alleges that in his lifetime the guardian in possession of the ward's money appropriated and converted the same; that eighteen months thereafter the guardian applied to the Court of his appointment in this State for an order authorizing him to borrow said money at interest at the rate of 3% per annum, therein concealing from said Court his said appropriation thereof and misrepresenting that it was in his possession, which order was made; that thereafter the guardian presented accounts, including his final account, to said Court wherein he did not disclose his appropriation of said money, did not present any excuse for failure to invest it for the ward's benefit, and did not charge himself with any interest thereon prior to said order, and thereby fraudulently and by imposition procured the Court to settle the same; that when the ward attained majority the guardian settled with him on the basis of the final

account, thereby depriving the ward of a large amount of interest rightfully his due. The bill pleads excuses to avoid laches, and the prayer is that all decrees of settlement of the guardian's account be set aside or held for naught, that a new account be stated, and that complainant have and recover from defendant as executrix the balance due thereon, alleged to be about \$24,700.00. The answer denies appropriation and conversion of said money, denies concealment from and misrepresentation [157] to the Court, denies anything due, and pleads insufficiency of the bill in part to state a cause of action in equity, *res judicata*, limitations and laches.

The evidence is brief and without conflict. It appears therefrom that in 1899 the estate of the ward's deceased father was in administration in this State. The heirs were complainant and his two sisters. The property thereof was here located and the guardian here resided. The principal of said property was sold at executor's sale, and was purchased for \$85,000.00 by the ward's uncle, who was thereafter by a court of this State appointed their guardian. He borrowed money upon his notes at interest of 9% per annum to pay for it. When he paid, the executor redelivered the money to the amount of about \$82,000 to him as guardian, and with it he paid his said notes. Eighteen months later the said Court made an order wherein is recited that the guardian applied for authority to borrow "the funds in his hands belonging to said minors" at interest, rate 3% per annum, which authority was granted. Thereafter the guardian presented accounts, one of them his final account,

to said Court, reciting his receipt of the money but not his use thereof, not charging himself with interest prior to said order, and not setting out any excuse for failure prior to said order to invest the money for the ward's benefit. Decrees of settlement of said accounts were entered. The ward attained majority in October, 1906, the final account was settled December 14, 1906, the balance thereby shown due the ward, \$23,954.00, was paid him on December 15, 1906, and an order discharging the guardian was made December 27, 1906. When complainant received the balance due him, he had no knowledge that the guardian had used the money prior to the order authorizing him to borrow it, and had no knowledge of the aforesaid concealments from and misrepresentations to the Court. His suspicions were first aroused by some information received [158] from his sister in or about August, 1907, and he then commenced in the aforesaid court a suit against the guardian wherein he alleged the purchase by the guardian of the property of his deceased father's estate was fraudulent, had been rescinded by complainant, and prayed for recovery of his distributive share of said property and accrued profits. The guardian died *without Montana* in October, 1908, and defendant herein was appointed executrix of his will in November, 1908, and substituted defendant in said suit. In the meantime complainant's sister brought a like suit to that aforesaid in this court, wherein the testimony of the guardian and other witnesses was taken before the guardian's death, and the suit aforesaid of this complainant in the State court was tried upon the evi-

dence submitted herein in his sister's suit. (The sister's suit may be found reported at 182 Fed. 540, 199 Fed. 689.)

Judgment went for defendant and establishing the validity of the purchase involved, complainant appealed to the Supreme Court of the State, and the judgment was affirmed.

See 45 Montana, 535.

Thereupon complainant moved for a rehearing, in part upon the ground that at least he was entitled to interest upon his money used by the guardian prior to the order authorizing the latter to borrow it, and that the suit should be remanded with leave to amend the complaint as a basis for its recovery. This was resisted by defendant and was denied by the Supreme Court, apparently on November 14, 1912.

March 14, 1913, complainant presented a claim consistent with the cause of action of the instant suit to defendant—executrix, and May 17, 1913, commenced this suit based upon said claim.

From complainant's majority until the guardian's death, the latter was within Montana but six months, and thereafter until this suit commenced, defendant was within Montana but fifteen [159] months. At all the times aforesaid the guardian, ward and defendant were citizens of Montana and defendant now is a citizen of Montana, save that complainant when this suit was commenced was a citizen of California. It would seem that the complainant is entitled to the relief prayed for. In so far as the answer depends on the ground that the bill in part is insufficient to constitute a cause of action in equity,

it is aimed at mere matter of inducement which may be ignored and the bill be yet sufficient. The facts clearly show the guardian violated his duty to the ward. He had neither legal nor moral right to use the ward's money to pay his, the guardian's debts, but having done so, it was his legal duty to disclose it in his accounts and charge himself with the profits he thereby made or legal interest at the Court's election. His failure therein was constructive if not actual fraud. In the matter of the Court's order authorizing the guardian to borrow the ward's money at less than a moiety of the legal rate of interest, there is no evidence of the circumstances of its procurement other than its own recitals. These compel the inference that the guardian not only concealed from the Court that eighteen months before he had used the ward's money, but also that he misrepresented to the Court expressly or by implication, that he then had in his possession the ward's money intact. Here again was fraud, constructive or actual, however lacking the guardian, a fiduciary, may have been of evil motive or intent.

The order so procured by fraud and imposition upon the Court was voidable and when challenged as here, affords no protection to the guardian. As though never made, the guardian is liable to the ward even as in the matter of the use of the money prior to the order. The relation of a guardian to his ward and to the Court is fiduciary. In him is reposed trust and confidence. He is a trustee and held to the strict accountability attaching to a trustee. The Court has statutory power to authorize a trustee

[160] and so a guardian, to enter into a transaction involving the trust and in which he has an interest adverse to the beneficiary, but only when the trustee discloses to the Court full knowledge of his motives and of all other facts which might affect the Court's decision.

Sec. 5376, R. S. Montana.

This disclosure was absent here. Had it been made, it is inconceivable that the order also would have been made. It is the contention of the defense, however, that the order and the decrees of settlement of the guardian's accounts and his discharge are conclusive and forbid any relief herein to complainant. It is true that decrees of a State court in probate, though in their nature *ex parte*, there being in fact no adversary proceedings, are generally conclusive, but like all other decrees, judgments, proceedings, they may be attacked and set aside, or rendered inoperative, when procured by fraud. The party thereto against whom they operate is not estopped from obtaining in a court of equity relief from them. It may be such relief could be procured in the court of their origin—by complainant in the instant suit in the State court of the decrees involved—but that is no reason why another court—this court in the instant suit by virtue of its equity jurisdiction and attaching by reason of diverse citizenship of the parties—may not and is not bound to give relief according to the recognized rules of equity.

Herein, this Court does not sit in review of the State court, nor inquire into mere irregularities and errors, nor assume to set aside the decrees involved,

but since said decrees were procured by fraud, it will deprive defendant of the benefit of them and of inequitable advantage derived under them.

See *Arrowsmith vs. Gleason*, 129 U. S. 86.

Marshall vs. Holmes, 141 U. S. 589.

This is equally true of the order and the guardian's discharge. [161]

The plea of *res judicata* is not well founded. The former suit had no double aspect and was based solely on rescission of a sale and to recover the specific property and accrued profits. It terminated by a judgment establishing the validity of the sale and denying the right to rescind. The instant suit is based on misappropriation by the guardian of money received from said sale and to recover interest as damages because thereof. Surely this suffices to demonstrate *res judicata* does not apply. True, the petition for rehearing in the former suit sought to secure leave to change the cause of action therein to that herein, to reverse the theory of the former suit, but it was resisted by defendant and denied by the Court. The cause of action herein was not in issue nor determined nor open to determination in the former suit.

In the matter of limitations, defendant's principal contention is that complainant's claim was not timely presented to the deceased guardian's executrix. The statute involved provides, among other things, that in the administration of estates "all claims arising upon contracts" must be presented within a limited time, that "any claim not so presented is barred forever," and that "no holder of any claim" shall maintain an action thereon unless it is first presented.

Complainant's claim was presented prior to suit, but not within a limited time. The statute distinguishes between claims arising upon contracts, that is, originating in contracts, and all other claims. Now, a claim against a guardian like that at bar does not arise upon contract. The relations between a guardian and ward are not contractual, but are fiduciary and created by law. The guardian's duty and obligation to deal justly with the ward are not of agreement, but are imposed by law. *Any* his breach thereof by fraud, as here, sounds in tort, and while the action may take the form of a suit in equity for an accounting, the gist of it is the guardian's fraudulent breach of an obligation imposed by law,—is fraud. In so far as complainant seeks interest [162] in excess of that received upon the money used by the guardian by virtue of the Court's order authorizing the guardian to borrow it, his claim does not rest upon nor arise upon the transaction in the nature of a contract so authorized by the Court. The order being voidable for the guardian's fraud, has been repudiated by complainant, and he demands his dues arising not at all from contract, but from the obligation imposed by law; viz.: that the guardian pay at least legal interest upon the ward's money used by him without lawful authority. It is defendant's contention that for a deceased trustee's breach of trust like that here involved, the beneficiary has but the right of a simple contract creditor, and so his claim is one arising upon contract within the meaning of the statutes aforesaid. The position of the beneficiary is like unto that a simple contract creditor, in

that he has no lien upon the estate and no priority. But this does not transform the claim from one *ex delicto* to one *ex contractu*, going only to its rank status in the matter of its payment from the assets of the estate. It satisfied the statute to present the claim before suit. The general statute of limitations relied upon by defendant is recognition that the gist of the suit is fraud. This statute is that the period prescribed for the commencement of an action is "within two years . . . for relief on the ground of fraud or mistake," computed from the aggrieved party's discovery of the facts constituting the fraud or mistake. Section 6458, R. S. Montana, provides that "if when a cause of action accrues against a person he is out of the State, the action may be commenced within the term herein limited after his return to the State, and if after the cause of action accrues he departs from the State, the time of his absence is not part of the time limited for the commencement of the action." Another section provides that if a person against whom a cause of action exists dies without the State, the time which elapses between his death and the expiration of one year [163] after the issuance within the State of letters testamentary, is not a part of the time limited for the commencement of an action against his personal representative. It is defendant's contention that section 6458, *supra*, is an exception to the general statute of limitations, to be strictly construed and not to include personal representatives of debtors, since they are not within its letter. If this be sound, the instant suit is barred. But it is the statute law of

Montana that strict construction of statutes derogatory of the common law is abolished and all statutes are to be liberally construed with a view to effect their objects and to promote justice. Sec. 6214, R. S. At common law, neither absence from the realm nor death suspended the operation of limitations. This was an evil and tended to defeat justice, in that at such times there could be no service of process and no effective prosecution of a cause of action. The object of sec. 6458, *supra*, was to furnish a remedy. The evil to be remedied and the object to be accomplished thereby attach no less to the case of absence of a personal representative than to the case of absence of a debtor. Prosecution to effect and justice are hampered equally in both cases. The reason for the statute is as potent in one as in the other. And though the literal reading of sec. 6458, *supra*, may support defendant's contention, it must yield to what must be assumed to have been the legislative intent, that is, to suspend limitations whenever absence from the State of the party defendant, be he debtor or personal representative, prevents effective prosecution of a cause of action. And so are the cases,

Hayden vs. Pierce (N. Y.), 39 N. E. 638.

Smith vs. Arnold, 1 Lea (Tenn.), 378.

Wilkinson vs. Winne, 15 Minn. 159.

And see French vs. Davis, 38 Miss. 218.

Cotton vs. Jones, 37 Tex. 34.

Under all the circumstances of this case, complainant has not been guilty of laches. As soon as his suspicions were aroused, he commenced the action in the State court. Although [164] he mistook his right

and remedy, it was not culpable negligence, as is evidenced by the fact that though he failed, his case was tried upon the evidence taken in his sister's suit in this court, and which herein succeeded. When he failed, with reasonable promptness he commenced the case at bar. It is to recover for breach of trust obligations. The guardian is dead, but otherwise there appears no change of conditions, no loss of evidence.

The Court is of the opinion that complainant is entitled to recover in the amount prayed for, viz.: \$17,015.23 and legal interest from June 14, 1908, to date, and costs.

Decree accordingly.

Feb. 7, 1914.

BOURQUIN, J.

Filed Feb. 7, 1914. Geo. W. Sproule, Clerk.
[165]

And thereafter, on February 10, 1914, a Final Decree was duly rendered and entered herein, in the words and figures following, to wit:

*In the District Court of the United States, in and for
the District of Montana.*

WILLIAM SMITH,

Complainant,

vs.

MARY M. SMITH, as Executrix of the Will of
JOHN M. SMITH, Deceased,

Defendant.

Decree.

This cause came on to be heard at this term, and

was argued by counsel; and thereupon, upon consideration thereof,

It is on this 10th day of February, 1914, Ordered, Adjudged and Decreed that complainant have and recover from the estate of John M. Smith, deceased, and from Mary M. Smith, as executrix of the estate of John M. Smith, deceased, defendant, the sum of seventeen thousand fifteen dollars and 23/100 dollars (\$17,015.23), with interest at eight per cent per annum from June 14, 1908, making a total of twenty-four thousand seven hundred twenty-one and 24/100 dollars (\$24,721.24).

It is further ordered, adjudged and decreed that complainant have and recover from the estate of John M. Smith, deceased, and from Mary M. Smith, as executrix of the estate of John M. Smith, deceased, defendant, his costs herein expended amounting to ninety-eight and 05/100 Dollars.

It is further ordered, adjudged and decreed that the amounts herein found due the complainant shall bear interest at the rate [166] of eight per cent per annum from this 10th day of February, 1914.

And it is further ordered, adjudged and decreed that said estate of John M. Smith, deceased, and said Mary M. Smith, as executrix of the estate of John M. Smith, deceased, defendant, pay in the due course of administration the amounts hereinbefore specified and found to be due the complainant.

GEO. M. BOURQUIN,
Judge.

[Indorsed]: Title of Court and Cause. Decree.
Filed and entered February 10, 1914. Geo. W.
Sproule, Clerk. [167]

Thereafter, on June 29, 1914, petition for appeal was duly filed and allowed herein, being in the words and figures following, to wit:

*In the District Court of the United States, Ninth
Circuit, District of Montana.*

WILLIAM SMITH,

Complainant,

vs.

MARY M. SMITH, as Executrix of the Will of
JOHN M. SMITH, Deceased,

Defendant.

Petition for Appeal.

To the Honorable the Judges of the District Court of
the United States, Ninth Circuit, District of
Montana:

The above-named defendant, feeling herself aggrieved by the decree made and entered in this cause on the 10th day of February, 1914, does hereby appeal from said decree to the Circuit Court of Appeals for the Ninth Circuit, for the reasons and upon the grounds specified in the assignment of errors, which is filed herewith, and she prays that her appeal be allowed and that citation issue as provided by law and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at

San Francisco, California, and your petitioner further prays that the proper order touching the security to be required of her to perfect her said appeal be made, and your petitioner will ever pray, etc.

H. G. & S. H. McINTIRE,
R. LEE WORD,

Solicitors for Defendant.

The aforesaid petition is granted and the appeal is allowed.

GEO. M. BOURQUIN,
Judge of the District Court of the United States for
the District of Montana, Ninth Circuit.

Filed June 29, 1914. Geo. W. Sproule, Clerk.
[168]

Thereafter, on June 29, 1914, Assignment of Errors was duly filed herein, in the words and figures following, to wit:

*In the District Court of the United States, Ninth
Circuit, District of Montana.*

IN EQUITY.

WILLIAM SMITH,

Complainant,

vs.

MARY M. SMITH, as Executrix of the Will of
JOHN M. SMITH, Deceased,

Defendant.

Assignment of Errors.

Comes now the above-named defendant, on this

29th day of June, 1914, and says that the decree entered in the above cause on the 10th day of February, 1914, is erroneous and unjust to the defendant, and assigns and specifies the following errors committed by the Court in the rendition and entry thereof:

1. The Court erred in holding and deciding adversely to the defendant herein that the claim of complainant upon which this action is based was not one that had to be presented to the defendant herein as executrix of the estate of John M. Smith, deceased, for allowance or disallowance, during the period of publication of notice to creditors of said estate as required by sections 7522, 7525 and 7532 of the Revised Statutes of Montana of 1907, relating to the settlement of claims against estates of deceased persons.

2. The Court erred in holding and deciding that the statutes of the State of Montana relating to the presentation of claims against the estates of deceased persons was not applicable to the claim of the said complainant herein.

3. The Court erred in holding and deciding that it was not necessary for complainant to present his claim against the estate of John M. Smith, deceased, to the executrix thereof [169] within the period of publication of notice to creditors of said estate, to wit, within ten months after the first publication of such notice, to wit, within ten months after November 18, 1908.

4. The Court erred in holding and deciding that complainant's claim herein, and upon which this action is founded, is one not arising in contract.

5. The Court erred in holding and deciding that complainant's cause of action herein was not barred by the Montana Statute of Limitations, to wit, by section 6449, subdivision 4, and section 6451 of the Revised Codes of Montana of 1907.

6. The Court erred in holding and deciding that the present action is one within the exception to the Montana Statute of Limitations, to wit, is one within and covered by the provisions of section 6458 of the Revised Codes of Montana of 1907.

7. The Court erred in holding and deciding that the Montana Statute of Limitations, in so far as the present action is concerned, was sustained during the absence of the defendant, executrix of the estate of John M. Smith, deceased, from the State of Montana.

8. The Court erred in holding and deciding the complainant was not guilty of laches in the bringing and prosecuting of the present action.

9. The Court erred in holding and deciding that the present action was not covered by and within the judgment of the District Court of the State of Montana of the Tenth Judicial District, in and for the County of Meagher, and of the Supreme Court of said State, in favor of this defendant and against said complainant, and that the complainant was not estopped and barred from maintaining the present action by reason of said judgment, and that said judgment is in *res adjudicata* of the present action.
[170]

10. The Court erred in holding and deciding that the order of the District Court of the Tenth Judicial District of the State of Montana, in and for the

County of Meagher, made and entered in said court on December 11, 1900, in the matter of the guardianship of William Smith, complainant herein, which was then pending in said court, and which order permitted the borrowing by John M. Smith, the guardian, of said minor, of certain moneys belonging to him, was void.

11. The Court erred in holding and deciding that the order of the said District Court of the Tenth Judicial District of the State of Montana, in and for the County of Meagher, whereby the final account of said John M. Smith, as guardian of said minor, was approved, and whereby the said John M. Smith, as such guardian, was discharged from his guardianship, was void and of no effect.

12. The Court erred in holding and deciding that plaintiff had not made an election of remedies which was conclusive upon him against his maintaining the present action when he brought and maintained in the State courts of Montana, to wit, in the District Court of the Tenth Judicial District of the State of Montana, in and for the County of Meagher, and in the Supreme Court of said State, said action, wherein and whereby he sought to set aside the sale of certain property belonging to said complainant, as a minor, to himself as guardian, in said guardianship proceeding.

13. The Court erred in deciding the present action in favor of complainant and against the defendant, and in ordering and entering judgment herein in favor of said complainant and against said defendant.

14. The Court erred in refusing to order and have entered judgment herein in favor of said defendant and against said complainant. [171]

15. The decree entered herein is erroneous in that judgment is thereby awarded against the estate of John M. Smith, deceased, and against defendant as executrix thereof generally, whereas, under and by virtue of the statutes of the State of Montana the judgment, in an action such as the one at bar, should be in the event that it is in favor of the complainant that his claim is allowed and that it should be paid out of the funds of the estate in due course of administration of said estate and not otherwise. Revised Codes of Montana of 1907, section 7536.

Wherefore, the said defendant prays that said decree be reversed and the said District Court be instructed and ordered to enter such decree as the Circuit Court of Appeals of the United States for the Ninth Circuit shall deem meet and proper on the record.

H. G. and S. H. McINTIRE,
R. LEE WORD,
Solicitors for Defendant.

Filed June 29, 1914. Geo. W. Sproule, Clerk.
[172]

Thereafter, on June 29, 1914, Order Allowing Appeal was duly made and entered herein, in the words and figures following, to wit:

[Order Allowing Appeal.]

In the District Court of the United States, Ninth Circuit, District of Montana.

WILLIAM SMITH,

Complainant,

vs.

MARY M. SMITH, as Executrix of the Will of
JOHN M. SMITH, Deceased,

Defendant.

At a stated term, to wit, the April term, A. D. 1914, of the District Court of the United States, of the Ninth Circuit, in and for the District of Montana, held at the courtroom in the City of Helena, State of Montana, on the 29th day of June, 1914; present, the Honorable Geo. M. Bourquin, District Judge. On reading and filing the petition of Mary M. Smith, as executrix of John M. Smith, deceased, defendant herein, for an order allowing an appeal, and the assignment of errors herein made and signed by the said Mary M. Smith on motion of Messrs. R. Lee Word and H. G. and S. H. McIntire, counsel for said defendant and appellant, Messrs. C. B. Nolan and William Scallon, counsel for respondent, being present,

It is Ordered that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at the said city of San Francisco, and the State of California, from the final decree heretofore made,

entered and filed herein on the 10th day of February, A. D. 1914, be and the same is hereby allowed, and that a transcript of the record be forthwith transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, said record to consist of a printed copy of the transcript, together with a transcript of all proceedings had and [173] used in the present action.

It is further ordered that the amount of the security on appeal herein to be furnished by the said Mary M. Smith, as executrix of the estate of John M. Smith, deceased, be and the same is hereby fixed at the sum of One Thousand Dollars, and that upon the making and filing with the Clerk of this court of a good and sufficient bond in said sum by the said Mary M. Smith, executrix as aforesaid, all further proceedings be superseded and stayed until the final determination of said appeal by the said United States Circuit Court of Appeals, and until the further order of this court.

GEO. M. BOURQUIN,

Judge.

Filed and entered June 29, 1914. Geo. W. Sproule,
Clerk. [174]

Thereafter, on June 30, 1914, Bond on Appeal was duly approved and filed herein, in the words and figures following, to wit:

In the District Court of the United States, Ninth Circuit, District of Montana.

WILLIAM SMITH,

Complainant,

vs.

MARY M. SMITH, as Executrix of the Will of
JOHN M. SMITH, Deceased,

Defendant.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS:
That we, Mary M. Smith, as executrix of the estate of John M. Smith, deceased, as principal, and the Montana Trust & Savings Bank Company, a corporation, as surety, are held and firmly bound unto the above-named William Smith in the sum of One Thousand Dollars (\$1,000.00) for the payment of which, well and truly to be made, we bind ourselves, jointly and severally, and each of our heirs, executors, administrators, successors and assigns, firmly by these presents.

Sealed with our seals and dated this 29th day of June, 1914.

Whereas, the above-named defendant has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse a decree rendered in the above-entitled cause, in the District Court of the United States, Ninth Circuit, District of

Montana, on the 10th day of February, 1914.

Now, therefore, the condition of this obligation is such that if the above-named defendant, Mary M. Smith, as executrix of the estate of John M. Smith, deceased, shall prosecute her said appeal to effect, and shall answer all damages and costs that may be awarded against her if she fails to make good her [175] plea, then the above obligation is to be void; otherwise, to remain in full force and virtue.

[Corporate Seal]

MARY M. SMITH,

As Executrix of the Will and Estate of John M. Smith, Deceased,

By H. G. & S. H. McINTIRE,

Her Attorneys in Fact.

MONTANA TRUST & SAVINGS BANK,

T. O. HAMMOND,

Cashier. [176]

State of Montana,

County of Lewis and Clark,—ss.

On this 29th day of June, 1914, before me, V. L. McCarthy, a Notary Public for the State of Montana, residing in the city of Helena, came T. O. Hammond, cashier of the Montana Trust & Savings Bank Company, to me personally known to be the cashier of said company, a corporation described in and which executed as surety the annexed bond, and being by me first duly sworn, stated that he, as cashier, duly executed the preceding instrument by order and authority of the Board of Directors of said Montana Trust & Savings Bank Company, and that the seal affixed to the preceding instrument is the corporate seal of the said company, that the corporate seal was

duly affixed by the authority of the Board of Directors of said company, and that the said Montana Trust & Savings Bank is duly and legally incorporated under the laws of the State of Montana, and is authorized under its charter to transact, and is transacting, the business of a surety company in the State of Montana, that said company has complied with all the laws of the State of Montana relating to surety companies doing business in that State, and is duly licensed and legally authorized by said State to qualify as sole surety on the bond hereto annexed; that the said company is authorized by its articles of incorporation and by its by-laws to execute the said bond, and that said T. O. Hammond, affiant, has been duly authorized by the Board of Directors of the said company to execute the foregoing bond.

T. O. HAMMOND.

Subscribed and sworn to before me this 29th day of June, 1914.

[Notarial Seal]

V. L. McCARTHY,

Notary Public.

Notary Public for the State of Montana, Residing at Helena, Montana.

My commission expires February 7th, 1917. [177]

The within undertaking on appeal is hereby approved.

Helena, Montana, June 30th, 1914.

GEO. M. BOURQUIN,

Judge.

Filed June 30, 1914. Geo. W. Sproule, Clerk.
[178]

Thereafter, on June 30, 1914, a Citation was duly issued herein, which said Citation is hereto annexed and is in the words and figures following, to wit:
[179]

*In the District Court of the United States, Ninth
Circuit, District of Montana.*

WILLIAM SMITH,

Complainant,

vs.

MARY M. SMITH, as Executrix of the Will of
JOHN M. SMITH, Deceased,
Defendant.

Citation [on Appeal (Original)].

United States of America,
District of Montana,—ss.

The President of the United States to William
Smith, and to C. B. Nolan and William Scallon,
His Solicitors:

You are herewith cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, State of California, within 30 days from the date hereof, pursuant to an appeal filed in the office of the Clerk of the District Court of the United States, Ninth Circuit, in and for the District of Montana, wherein William Smith is complainant and respondent, and Mary M. Smith, as executrix of the will of John M. Smith, deceased, is defendant and appellant, to show cause, if any there be, why the judgment and decree in said appeal mentioned should not be corrected and why speedy jus-

tice should not be done to the parties in that behalf.

WITNESS the Honorable GEO. M. BOURQUIN, Judge of the District Court of the United States for the District of Montana, this 30th day of June, A. D. 1914.

GEO. M. BOURQUIN,
Judge of the District Court of the United States, for
the District of Montana.

Personal service of the foregoing citation upon us and receipt [180] of a copy thereof this 30th day of June, 1914, is hereby acknowledged.

T. J. WALSH,
C. B. NOLAN and
WM. SCALLON,

Solicitors for Complainant. [181]

[Endorsed]: No. 5. In the District Court of the United States for the District of Montana. Wm. Smith vs. Mary M. Smith, as Executrix. Citation. Filed June 30th, 1914. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy. [182]

Thereafter, on July 2, 1914, a Praeceptum for Transcript on Appeal was duly filed herein, in the words and figures following, to wit: [183]

[Praeceptum for Transcript of Record.]

*In the District Court of the United States, in and for
the District of Montana.*

IN EQUITY.

WILLIAM SMITH,

Complainant,

vs.

MARY M. SMITH, as Executrix of the Estate of
JOHN M. SMITH, Deceased,

Defendant.

To the Clerk of said Court:

You will please incorporate into the transcript on appeal in the above-entitled action the following portions of the record in said cause, to wit: The bill of complaint, the subpoena with proof of service, defendant's answer to the bill of complaint, the statement of the evidence had on the trial of said cause, settled by the Judge, including Defendant's Exhibits "A" and "B," the opinion of the Court rendered in said cause, the final decree rendered and entered therein, the petition on appeal together with the Court's allowance thereof, the assignment of errors, the order of Court allowing the appeal, the bond on appeal, the citation on appeal together with proof of service thereof, the Clerk's certificate to transcript.

of record, and the names and addresses of the solicitors of record.

Yours etc.,

R. LEE WORD,

H. G. & S. H. McINTIRE,

Solicitors for Defendant.

Helena, Montana, July 2, 1914.

Service upon us this 2d day of July, 1914, of a copy of the foregoing praecipe indicating portions of the record to be incorporated in the transcript on appeal is hereby acknowledged.

C. B. NOLAN and

WM. SCALLON,

Solicitors for Complainant.

Filed July 2, 1914. Geo. W. Sproule, Clerk.
[184]

Clerk's Certificate to Transcript of Record.

United States of America,
District of Montana,—ss.

I, Geo. W. Sproule, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, of 185 pages, numbered consecutively from 1 to 185, inclusive, is a full, true and correct transcript of the bill of complaint, subpoena with proof of service, answer, statement of evidence, opinion, final decree, petition for appeal, assignment of errors, order allowing appeal, bond and praecipe for transcript of record on appeal, mentioned in said praecipe for transcript, as appears

from the original records and files of said court in my possession as such Clerk; and I do further certify and return that I have annexed to said transcript and included within said paging the original citation issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of Thirty-one and 70/100 Dollars (\$31.70), and have been paid by the appellant.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court at Helena, Montana, this 17th day of July, A. D. 1914.

[Seal]

GEO. W. SPROULE,
Clerk. [185]

[Endorsed]: No. 2448. United States Circuit Court of Appeals for the Ninth Circuit. Mary M. Smith, as Executrix of the Will of John M. Smith, Deceased, Appellant, vs. William Smith, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Montana.

Received and filed July 21, 1914.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

11
NO. 2448.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

MARY M. SMITH, as Executrix
of the Will of John M. Smith,
Deceased,

Appellant,

vs.

WILLIAM SMITH,

Appellee.

BRIEF OF APPELLANT

R. LEE WORD,

H. G. & S. H. McINTIRE,

Solicitors and of Counsel for Appellant.

Filed

SEP 16 1914

F. D. Monckton,
Clerk.

NO. 2448.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

MARY M. SMITH, as Executrix
of the Will of John M. Smith,
Deceased,

Appellant,

vs.

WILLIAM SMITH,

Appellee.

BRIEF OF APPELLANT

STATEMENT.

The present is an appeal from a decree entered by the District Court of the United States for the District of Montana on the 10th day of February, 1914, in favor of said appellee and against said appellant. The suit in which said decree was entered was brought by the appellee to have an alleged claim he had had against John M. Smith, appellant's testator, in his lifetime, established as an allowed claim against his estate. The basis of the claim is as follows:

The said John M. Smith was, during his lifetime, guardian of the appellee; as such guardian he had received on June 14, 1899, the sum of \$27,390.06, being the ward's share of certain property left by his deceased father, William A. Smith, and which sum was the proceeds of a certain sale of said property made by the executor of William A. Smith to the said John M. Smith; while acting as guardian of said appellee the said John M. Smith, acting under an order of the District Court of the State of Montana in and for the County of Meagher, in which court said guardianship matter was pending, and which had jurisdiction of the same, made and entered on December 11, 1900, used the said moneys, charging himself with interest thereon at three per cent per annum from the date of and pursuant to said order; on December 1, 1906, the said guardian filed in said state court his final account as such guardian, wherein he was charged with the amount so received by him, \$27,390.06, together with interest thereon reckoned at the rate of three per cent for each of the years from December 11, 1900, to November 30, 1906, making a total of \$32,918.57, and he was credited with the sum of \$8,954.56 disbursements made by him as guardian for the use of said ward (Transcript, pp. 18 to 27), leaving a balance of \$23,954.01; this account was by said state court approved (Transcript, pp. 174-177); and upon proof of the payment of said balance to the ward, a final decree was on December 27, 1906, entered in said matter in said state court discharging the said John M.

Smith as said guardian (Transcript, pp. 178-179); these proceedings in the state court are attacked in the present suit as fraudulent and void, and the lower court has deprived the appellant of any benefit from them (Transcript, p. 189, ll. 1 to 7); the appellee attained his majority on the 10th day of October, 1906, and some time after, in the year 1907, instituted an action against the said John M. Smith to set aside the sale of the said property from the executor of said William A. Smith to John M. Smith, and for general relief (Transcript, pp. 69 to 85); subsequent to the institution of this suit, and on October 6, 1908, the said John M. Smith died, leaving a will in which appellant was named executrix; this will was duly admitted to probate by said Meagher County District Court; letters testamentary were duly issued to her, upon which she qualified, and she was then substituted as party defendant in said suit; elaborate findings of fact were made therein and final judgment on the merits was entered in favor of defendant in said suit, appellant here (Transcript, pp. 90-112), which was on June 10, 1912, affirmed by the Supreme Court of the State of Montana (45 Mont. 535). Upon her qualification as such executrix, and in pursuance of an order of court in said proceedings, and in pursuance of § 7522 of the Revised Codes of Montana, which reads:

“§ 7522. Every executor or administrator must immediately after his appointment, cause to be published in some newspaper in the county, if

there be one, if not then in such newspaper as may be designated by the court or judge, a notice to the creditors of the decedent, requiring all persons having claims against him to exhibit them, with the necessary vouchers, to the executor or administrator, at the place of his residence or business, to be specified in the notice; such notice must be published as often as the court or judge shall direct; but not less than once a week for four weeks; the court or judge may also direct additional notice by publication or posting. In case such executor or administrator resigns, or is removed, before the time expressed in the notice, his successor must give notice only for the unexpired time allowed for such presentation,”

notice was duly published to all persons having claims against said estate to exhibit the same with the necessary vouchers as required by the laws of said state, and the office of the attorney of the said estate at White Sulphur Springs, Meagher County, Montana, was therein designated as the place where such claims might be presented and exhibited; the publication of said notice began on December 18, 1908, and was continued in pursuance of § 7523 of the Revised Codes of Montana, which reads:

“§ 7523. The time expressed in the notice must be ten months after its first publication when the estate exceeds in value the sum of ten thousand dollars, and four months when it does not.”

No claim of any kind of said appellee against said estate was presented or exhibited during the statutory period of publication, to-wit, within ten months from

December 18, 1908, nor at all, save that on March 14, 1913, a claim was presented by appellee, to the attorney of said estate at such designated place, whereby he claimed that said estate was indebted to him in the sum of \$17,015.23, such sum being the difference in interest at the rate of eight per cent per annum, compounded annually, from June 14, 1899, and the said three per cent interest with which appellant's testator had charged himself; such claim was disallowed and rejected in pursuance of § 7525 and § 7532 of the Revised Codes of Montana, which read:

“§ 7525. All claims arising upon contracts, whether the same be due, not due or contingent, must be presented within the time limited in the notice, and any claim not so presented is barred forever; *provided, however*, that when it is made to appear by the affidavit of the claimant, to the satisfaction of the court or judge, that the claimant had no notice as provided in this Title, by reason of being out of the state, it may be presented at any time before an order of distribution is entered; *and, provided, further*, that nothing in this Title contained shall be so construed as to prohibit the right, or limit the time of foreclosure of mortgages upon real property of decedents, whether heretofore or hereafter executed, but every such mortgage may be foreclosed within the time and in the manner prescribed by the provisions of this Code, other than those of this Title, except that no balance of the debt secured by such mortgage remaining unpaid after foreclosure, shall be a claim against the estate, unless such debt was presented as required by the provisions of this Title.”

“§ 7532. No holder of any claim against an estate shall maintain any action thereon, unless the claim is first presented to the executor or administrator, except in the following case: An action may be brought by any holder of a mortgage or lien to enforce the same against the property of the estate subject thereto, where all recourse against other property of the estate is expressly waived in the complaint; but no counsel fees shall be recovered in such action unless such claim be so presented,”

and thereafter, on May 17, 1913, the present action was begun thereon. An elaborate bill of complaint (Transcript, pp. 1-28) appears, and an answer thereto (Transcript, pp. 31-40). The case in due course came up for trial before the said district court. Certain testimony was introduced which appears in the statement of the evidence (Transcript, pp. 41-182) and the case was submitted. Afterwards in February a written opinion (Transcript, pp. 183-193) was filed herein upon which decree was ordered and entered on February 10, 1914 (Transcript, pp. 193-194). From this decree the present appeal is duly taken (Transcript, pp. 195-207).

The foregoing statement is taken from the undisputed allegations of the bill and answer and from the evidence preserved in said statement. We think the same sufficiently presents the contention of the appellee, and the contentions of appellant appear at length in the assignment of errors accompanying the petition on appeal. (Transcript, pp. 196-200).

SPECIFICATIONS OF ERROR RELIED ON.

1. The court erred in holding and deciding adversely to the appellant herein that the claim of appellee upon which this action is based was not one that had to be presented to the defendant herein as executrix of the estate of John M. Smith, deceased, for allowance or disallowance, during the period of publication of notice to creditors of said estate as required by § 7522, § 7525 and § 7532 of the Revised Statutes of Montana of 1907, relating to the settlement of claims against estates of deceased persons.

2. The court erred in holding and deciding that the statutes of the State of Montana relating to the presentation of claims against the estates of deceased persons was not applicable to the claim of the said appellee herein.

3. The court erred in holding and deciding that it was not necessary for appellee to present his claim against the estate of John M. Smith, deceased, to the executrix thereof within the period of publication of notice to creditors of said estate, to-wit, within ten months after the first publication of such notice, to-wit, within ten months after November 18, 1908.

4. The court erred in holding and deciding that appellee's claim herein, and upon which this action is founded, is one not arising in contract.

5. The court erred in holding and deciding that appellee's cause of action herein was not barred by

the Montana statute of limitations, to-wit, by § 6449, subdivision 4, of two years, and § 6451 of the Revised Codes of Montana of 1907, which read: (Within two years)

“§ 6449, Sub. 4: An action for relief on the ground of fraud or mistake the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake.”

“§ 6451: An action for relief not hereinbefore provided for, must be commenced within five years after the cause of action shall have accrued.”

6. The court erred in holding and deciding that the present action is one within the exception to the Montana statute of limitations, to-wit, is one within and covered by the provisions of § 6458 of the Revised Codes of Montana of 1907, which reads:

“§ 6458. If when the cause of action accrues against a person, he is out of the state, the action may be commenced within the term herein limited, after his return to the state, and if, after the cause of action accrues, he departs from the state, the time of his absence is not part of the time limited for the commencement of the action.”

7. The court erred in holding and deciding that the Montana statute of limitations, in so far as the present action is concerned, was suspended during the absence of the appellant, executrix of the estate of John M. Smith, deceased, from the State of Montana.

8. The court erred in holding and deciding the

appellee was not guilty of laches in the bringing and prosecuting of the present action.

9. The court erred in holding and deciding that the present action was not covered by and within the judgment of the District Court of the State of Montana of the Tenth Judicial District, in and for the County of Meagher, and of the Supreme Court of said state, in favor of this appellant and against said appellee, and that the appellee was not estopped and barred from maintaining the present action by reason of said judgment, and that said judgment is not *res adjudicata* of the present action.

10. The court erred in holding and deciding that the order of the District Court of the Tenth Judicial District of the State of Montana, in and for the County of Meagher, made and entered in said court on December 11, 1900, in the matter of the guardianship of William Smith, appellee herein, which was then pending in said court, and which order permitted the borrowing by John M. Smith, the guardian, of said minor, of certain moneys belonging to him, was void.

11. The court erred in holding and deciding that the order of the said District Court of the Tenth Judicial District of the State of Montana, in and for the County of Meagher, whereby the final account of said John M. Smith, as guardian of said minor, was approved, and whereby the said John M. Smith, as such guardian, was discharged from his guardianship, was void and of no effect.

12. The court erred in holding and deciding that appellee had not made an election of remedies which was conclusive upon him against his maintaining the present action when he brought and maintained in the state courts of Montana, to-wit, in the District Court of the Tenth Judicial District of the State of Montana, in and for the County of Meagher, and in the Supreme Court of said state, said action, wherein and whereby he sought to set aside the sale of certain property belonging to said appellee, as a minor, to himself as guardian, in said guardianship proceeding.

13. The court erred in deciding the present action in favor of appellee and against the appellant, and in ordering and entering judgment herein in favor of said appellee and against said appellant.

14. The court erred in refusing to order and have entered judgment herein in favor of said appellant and against said appellee.

15. The decree entered herein is erroneous in that judgment is thereby awarded against the estate of John M. Smith, deceased, and against appellant as executrix thereof generally, whereas, under and by virtue of the statutes of the State of Montana the judgment, in an action such as the one at bar, should be in the event that it is in favor of the complainant that his claim is allowed and that it should be paid out of the funds of the estate in due course of administration of said estate and not otherwise, Revised Codes of Montana of 1907, § 7536, which reads:

“§ 7536. A judgment rendered against an executor or administrator upon any claim for money against the estate of his testator or intestate, only establishes the claim in the same manner as if it had been allowed by the executor or administrator and a judge; and the judgment must be that the executor or administrator pay, in due course of administration, the amount ascertained to be due. A certified transcript of the docket of the judgment must be filed among the papers of the estate in court. No execution must issue upon such judgment, nor shall it create any lien upon the property of the estate, or give to the judgment creditor any priority of payment.”

ARGUMENT.

As will be seen by the above specifications of error the contentions of the appellant may be subdivided under several heads, viz: Statute of Non-Claim, covered by specifications Nos. 1, 2, 3, 4; Statute of Limitations, covered by specifications Nos. 5, 6, 7; Laches, covered by specification No. 8; Former Adjudication, covered by specification No. 9; the Order of December 11, 1900, covered by specification No. 10; the Orders settling guardian's final account and discharging him, covered by specification No. 11; Election of Remedies, covered by specification No. 12; and the Decree, covered by specifications Nos. 13, 14 and 15, and we shall take up the same in that order.

I.

STATUTE OF NON-CLAIM.

In the opinion upon which the decree appealed from is based (Transcript, pp. 183-193) the lower court held that the claim of appellee was not one which by the state statute is required to be first presented to the executrix before suit could be brought upon the same. Both upon principle and direct authority we submit that in this regard said court erred, and our contention is that under the Montana statutes, if such a claim is not presented to the executrix within the time prescribed therefor, it is forever barred, and no action can be maintained thereon. The appropriate Montana statutes are:

Revised Codes, § 7522, which reads:

“Every executor or administrator must, immediately after his appointment, cause to be published in some newspaper in the county, if there be one, if not, then in such newspaper as may be designated by the court or judge, a notice to the creditors of the decedent, requiring all persons having claims against him to exhibit them, with the necessary vouchers, to the executor or administrator, at the place of his residence or business, to be specified in the notice; such notice must be published as often as the court or judge shall direct, but not less than once a week for four weeks; the court or judge may also direct additional notice by publication or posting. In case such executor or administrator resigns, or is removed, before the time expressed in the notice,

his successor must give notice only for the unexpired time allowed for such presentation."

Revised Codes, § 7523, which reads:

"The time expressed in the notice must be ten months after its first publication when the estate exceeds in value the sum of ten thousand dollars, and four months when it does not."

Here the first publication was December 18, 1908, and ten months thereafter was October 18, 1909. The claim was not presented until March 14, 1913.

Revised Codes, § 7525, in so far as it applies to the present case, reads as follows:

"All claims arising upon contracts, whether the same be due, not due or contingent, must be presented within the time limited in the notice, and any claim not so presented is barred forever; *provided, however*, that when it is made to appear by the affidavit of the claimant, to the satisfaction of the court or judge, that the claimant had no notice as provided in this Title, by reason of being out of the state, it may be presented at any time before an order of distribution is entered;"

Revised Codes, § 7530, which reads:

"When a claim is rejected either by the executor or administrator, or the judge, the holder must bring suit in the proper court against the executor or administrator within three months after the date of its rejection, if it be then due, or within two months after it becomes due, otherwise the claim shall be forever barred."

Revised Codes, § 7531, which reads:

"No claim must be allowed by the executor or administrator, or by the judge, which is barred

by the statute of limitations. When a claim is presented to a judge for his allowance he may, in his discretion, examine the claimant and others on oath and hear any legal evidence touching the validity of the claim.”

Revised Codes, § 7532, which reads:

“No holder of any claim against an estate shall maintain any action thereon, unless the claim is first presented to the executor or administrator, except in the following case: An action may be brought by any holder of a mortgage or lien to enforce the same against the property of the estate subject thereto, where all recourse against other property of the estate is expressly waived in the complaint; but no counsel fees shall be recovered in such action unless such claim be so presented.

Like practically all the statutes relating to the estates of deceased persons, the legislature of Montana has taken the above enumerated statutes from those of California. Said § 7522 being § 1490 of the California Code of Civil Procedure; § 7523 being § 1491; and § 7532 being § 1500; § 1493 of the said California Code is Rev. Codes, § 7525, and reads as follows:

“All claims arising upon contract, whether the same be due, not due, or contingent, must be presented within the time limited in the notice, and any claim not so presented is barred forever; *provided, however*, that when it is made to appear by the affidavit of the claimant, to the satisfaction of the court, or a judge thereof, that the claimant had no notice as provided in this chapter, by

reason of being out of the state, it may be presented at any time before a decree of distribution is entered."

The history of this section, as appears in the footnote thereto in 3 Kerr's Cyc. Codes of California, is that it was enacted March 11, 1872, it being a substantial re-enactment of the earlier act of 1860.

The annotation to Montana Revised Codes, § 7525, shows that it was enacted March 7, 1895. It follows, then, that the decisions of the Supreme Court of California construing those sections of the statute are of the most persuasive and convincing force, and as to those decisions which preceded March 7, 1895, by a familiar rule of statutory construction, it must be presumed that the decisions of the California Supreme Court were adopted with the statutes. Many California decisions appear in which it is held that under facts precisely like those in the present case the statute of Non-Claim, § 1493, of that state is applicable, and that a failure to comply with it is fatal to a right of recovery. Thus in the case of *Lathrop v. Bampton*, 31 Cal. 17, decided in 1866, where the facts were on all fours with the instant case, viz, an action by a ward, through her guardian, against the executor of a former, deceased, guardian, the latter being charged with having received funds of the ward, "which he never invested for the benefit of the ward, nor kept the same apart from his private account; nor kept any account thereof, or of the income or expenses therefrom between himself and his ward, but on the

contrary mixed the same with his private funds and used it in his general business, expenditures and investments, etc.” The defendant (executor) having refused to account, the action was brought. No claim was ever presented to the executor as provided in the act concerning the settlement of estates of deceased persons. The lower court rendered a decree for the plaintiff, which was reversed by the supreme court. In the opinion on page 23, the excerpt from Thompson’s Appeal, 22 Penn. St. 17, is quoted with approval:

“Whenever a trust fund has been wrongfully converted into another species of property, if its identity can be traced, it will be held, in its new form, liable to the rights of the *cestui que trust*. No change of its state and form can divest it of such trust. So long as it can be identified, either as the original property of the *cestui que trust*, or as the product of it, equity will follow it; and the right of reclamation attaches to it until detached by the superior equity of a bona fide purchaser for a valuable consideration without notice. The substitute for the original thing follows the nature of the thing itself so long as it can be ascertained to be such. But the right of pursuing it fails when the means of ascertainment fail. This is always the case where the subject matter is turned into money, and mixed and confounded in a general mass of property of the same description. (Story Eq. §§ 1257-9; Tiffany and Bullard on Trusts and Trustees, 33, 34).”

And further:

“Where a trustee, in violation of his trust,

invests the property or its proceeds in any other property, the *cestui que trust* may elect to hold the substituted property subject to the trust, or to hold the trustee personally liable to him for the breach of the trust. The former he can do, however, only when he can follow and identify the property, either in its original or substituted form, as we have already seen. If this cannot be done, the right of the *cestui que trust* is gone, because its exercise has become impossible, and he is therefore forced to rely upon the personal liability of the trustee; and such seems to be the condition of the *cestui que trust* in the present case. When thus forced to rely upon the personal liability of the trustee, a *cestui que trust* occupies a position towards the estate of the trustee which is no better, but is *identical with that of a simple contract creditor*. He has no special lien upon the general estate of the trustee which is superior to that of any other creditor; for the specific property covered by the trust is gone, and nothing is left to the *cestui que trust* except a naked claim for damages generally, on account of the breach, to be obtained through an action at law, attended by all the incidents of a like action on behalf of one who is not the beneficiary of a trust."

And:

"Our conclusion is that the plaintiffs, upon the facts as disclosed by the record, had only a claim against the estate of Griffith, upon which they could have recovered had the same been presented to the defendant as required by the act concerning the settlement of estates of deceased persons, but that they are not entitled to the relief

which they obtained in the court below.”

Lathrop v. Bampton, 31 Cal. 17, 23, 24;

This case has frequently been cited with approval, viz, in

Falkner v. Hendy, 107 Cal., 54; 40 Pac. 21;

Orcutt v. Gould, 117 Cal., 316; 49 Pac. 188;

Ellison v. Moses, 95 Ala.. 228; 11 So. 347;

Newberry v. Wilkinson, 190 Fed. 67; s. c. 199
Fed. 682 (9 C. C. A.);

and other cases cited in the notes to California reports under said case in 31 Cal. 17.

See also Burke v. Maguire, 154 Cal. 469; 98 Pac. 21.

Again, in 1884, the supreme court of California in a case exhibiting the following facts:

“The plaintiff, while a minor, was under the guardianship of Emily E. Hersperger, who died intestate. The defendant Winn was appointed administrator of her estate in 1877. The plaintiff reached majority in September, 1881. This action was for an accounting as to a fund held by the decedent as a guardian, and was commenced in June, 1883. No presentation of the claim was ever made to the administrator. A nonsuit was granted.”

The court held:

“We think the motion for a non-suit was properly granted. The claim on which the action is based was never presented for allowance to the defendant as the administrator of the estate of Mrs. Hersperger, deceased.”

Gillespie v. Winn, 65 Cal. 429.

In the annotation to said Cal. C. C. P., § 1493, in 3 Kerr's Cyc. Codes, Cal., on page 1955, appear the following:

"65 Where demand against deceased is for money received by him and commingled with his own so that no funds come to executor bearing earmarks of creditor's property, presentation of claim is required, and executor cannot pay such demand until it be so presented, and claim allowed and payment authorized by court. The executor owes no duty to beneficiaries of trust to keep money invested, and he cannot pay until authorized. The estate is simply indebted in amount, and, under such circumstances, compound interest cannot be charged beyond time of decedent's death.—Bemmerly vs. Woodward, 124 Cal. 568, 574, 57 Pac. Rep. 561."

"66. If deceased was in possession of trust fund, which in mutations of business had become so mingled and absorbed into property belonging to trustee as to be no longer capable of being traced or identified, only remedy of *cestui que trust* against administrator or estate of trustee would be that of creditor, and if he failed to present his claim as required by probate law, he must fail in an action against administrator, but if trust property can still be earmarked or traced and identified *cestui que trust* may maintain his action against administrator to enforce trust, for he is seeking his own property; not to enforce claim against estate and property of decedent.—Roach vs. Caraffa, 85 Cal. 436, 443, 25 Pac. Rep. 22. See Lathrop vs. Bampton, 31 Cal. 17; Sharpstein vs. Friedlander, 54 Cal. 58; Estate of Allgier, 65 Cal. 228, 3 Pac. Rep. 849."

"67. Where one executor who is also legatee dies pending administration, having certain amount of money in his hands belonging to estate, for which no claim was presented against estate of deceased executor within time limited therefor, court has no power to deduct same from legacy to deceased's executor and distribute it to estate. It was duty of surviving executor to have presented claim, or to have compelled accounting. Deceased executor held money in trust for estate and its position upon his death became no better than that of any other creditor unless such estate was able to pursue precise trust fund.—Estate of Smith, 108 Cal. 115, 122, 40 Pac. Rep. 1037.

See *Lathrop vs. Bampton*, 31 Cal. 17, 23; *Choquette vs. Ortet*, 60 Cal. 594; *Roach vs. Carraffa*, 85 Cal. 436, 444, 25 Pac. Rep. 22; *Estate of Alliger*, 65 Cal. 228, 230, 3 Pac. Rep. 849."

In *Orcutt v. Gould*, 117 Cal. 316, 49 Pac. 188, the syllabus reads:

"An action will not lie against an executor to have a trust declared against his testator's property for money received by the testator, where the trust fund cannot be identified by showing a separate and independent fund or value readily distinguishable from all other funds; the proper remedy being the presentation of plaintiff's claim to the executor, and suit thereon if rejected."

The court says:

"Upon the facts disclosed by the record, the relief sought cannot be secured. Conceding the existence of a trust, plaintiff's remedy was the presentation of her claim to the executor, and suit thereon if rejected. *McGrath v. Carroll*, 110

Cal. 79, 42 Pac. 466. The law upon this question of trusts, as involving facts similar to those here disclosed, was laid down in *Lathrop v. Bampton*, 31 Cal. 17, and as there laid down, has been approved and affirmed to the present time. *McGrath v. Carroll*, *supra*; *Byrne v. Byrne*, 113 Cal. 294, 45 Pac. 536. The present action is one to enforce a trust, and, as said in *Lathrop v. Bampton*, before the *cestui que trust* can claim specific real or personal property, "he must show that it is the identical property originally covered by the trust, or that it is the fruit or product thereof in a new form." To justify a recovery, a beneficiary must be able to follow and identify the property, either in its original or substituted form. In speaking of a money trust fund, the court, in the above case, said: "The identity of a trust fund consisting of money may be preserved, so long as it can be followed and distinguished from all other funds, not by identifying the individual pieces or coins, but by showing a separate and independent fund or value readily distinguishable from all other funds." In that case the deceased left certain money in addition to other personal property and real estate, and the court held that the money left by deceased could not be impressed with the trust, as the evidence failed to show that it was any part of the trust fund."

In *McGrath v. Carroll*, 110 Cal. 79, 42 Pac. 466

(1895) the syllabus reads:

"One who claims to be a beneficiary of funds received by a decedent as trustee must present his demand against the estate for allowance, like other claims, unless the identical trust property, or its product in a new form, can be traced into

the possession of the personal representatives.”

This latter case was affirmed in *Grubb v. Chase*, 158 Cal. 352, 111 Pac. 91, the court saying:

“The very gist of plaintiff’s action was the alleged fraud perpetrated upon him by Foster. Such fraud must be alleged and proved, and, in order that an action may be maintained against the administrator of an estate, a claim of this kind must be fully presented according to law. *McGrath v. Carroll*, 110 Cal. 79, 42 Pac. 466.”

Lathrop v. Bampton, *supra*, and *McGrath v. Carroll*, *supra*, are cited with approval, along with other cases, in *Newberry v. Wilkinson*, 190 Fed. 67 and same case (9 C. C. A.), 199 Fed. 682.

In *Ellison v. Moses*, 95 Ala. 228, 11 So. 349, where *Lathrop v. Bampton*, *supra*, is cited and quoted with approval, the following is said:

“The rule is well settled that the *cestui que trust* is entitled to have the trust visited upon any property into which the trust funds have been invested by the trustee in breach of his duty, or by any third person with notice of the trust, so long as such funds can be satisfactorily traced and identified. But in case of a mere money trust, when the money has been mingled with the funds of the trustee or of another person, so that it cannot be distinguished and identified, and cannot be traced into any particular property, there is no longer any specific thing upon which the trust may attach; and in such case nothing is left to the *cestui que trust* but the moneyed liability in his favor of the trustee or of the third

person who has used the fund with notice of its trust character, and such liability stands upon the same footing as a mere debt, and the *cestui que trust* has no advantage over a general creditor, *Parker v. Jones*, 67 Ala. 234; *Goldsmith v. Stetson*, 30 Ala. 164; *Stewart v. Fry*, 3 Ala. 573; *Maury v. Mason*, 8 Port. 211; *Indeed, the trustee's personal liability to make compensation for the loss occasioned by a breach of trust is a simple contract equitable debt.* *Vernon v. Vawdry*, 2 Atk. 119; *Benbury v. Benbury*, 2 Dev. & B. Eq. 235; 2 Pom. Eq. Jur. § 1080; 2 Lewin Trusts (Flint's Ed) * 906."

[Brown's Estate v. Stair, 136 Pac. 1007]

The authorities cited fully sustain the designation of such a claim as a "simple contract equitable debt." Thus in 3 Pomeroy Equity Jurisprudence (3rd. Ed.), § 1080, it is said:

"It has already been shown that a beneficiary may always claim and reach the trust property through all its changes of form while in the hand of the trustee, and that he may also follow it into the possession and apparent ownership of third persons, until it has been transferred to a *bona fide* purchaser for valuable consideration and without notice; and that a court of equity will furnish him with all the incidental remedies necessary to enforce his claim and to render it effective. In addition to this claim of the beneficiary upon the trust estate as long as it exists, the trustee incurs a personal liability for a breach of trust by way of compensation or indemnification, which the beneficiary may enforce at his election, and which becomes his only remedy whenever the trust property has been lost or put

beyond his reach by the trustee's wrongful act. *The trustee's personal liability to make compensation for the loss occasioned by a breach of trust is a simple contract equitable debt.* It may be enforced by a suit in equity against the trustee himself, or against his estate after his death, and the statute of limitations will not be admitted as a defense unless the statutory language is express and mandatory upon the court. The amount of the liability is always sufficient for the complete indemnification and compensation of the beneficiary."

And the footnote thereto reads:

"Vernon v. Vawdry, 2 Atk. 119. Adey v. Arnold, 2 De Gex, M. & G. 432; Lockhart v. Reilly, 1 De Gex & J. 464; Obee v. Bishop, 1 De Gex, F. & J. 137; Ex parte Blencowe, L. R. 1 Ch. 393; Holland v. Holland, L. R. 4 Ch. 49; Wynch v. Grant, 2 Drew. 312; Benbury v. Benbury, 2 Dev. & B. Eq. 235, 236; (Little v. Chadwick, 151 Mass. 109). The distinction between specialty debts and simple contract debts in the settlement of estates being generally abolished in this country, the liability of the trustee may properly be described as an equitable contract liability or debt,—that is, an equitable liability of the same nature as that arising from breach of contract."

And in 2 Lewin on Trusts, 906, it is said:

"Breach of trust constitutes simple contract debt unless the trustee has covenanted. The claim of the *cestui que trust* is in general a *simple contract debt*."

In Little v. Chadwick, 151 Mass. 110, the court says:

“When trust money becomes so mixed up with the trustee’s individual funds that it is impossible to trace and identify it as entering into some specific property, the trust ceases. The court will go as far as it can in thus tracing and following trust money; but when, as a matter of fact, it cannot be traced, the equitable right of the *cestui que trust* to follow it fails. Under such circumstances, if the trustee has become bankrupt, the court cannot say that the trust money is to be found somewhere in the general estate of the trustee that still remains; he may have lost it with property of his own; and in such case the *cestui que trust* can only come in and share with the general creditors. *Johnson v. Ames*, 11 Pick. 173, 181, 182. *Le Breton v. Pierce*, 2 Allen, 8, 13. *Andrews v. Bank of Cape Ann*, 3 Allen, 313. *Harlow v. Deshon*, 111 Mass. 195, 198, 199. *Bresnihan v. Sheehan*, 125 Mass. 11. *White v. Chapin*, 134 Mass. 230. *Howard v. Fay*, 138 Mass. 104. *Attorney General v. Brigham*, 142 Mass. 248. *Trecothick v. Austin*, 4 Mason, 16, 29. *Ferris v. Van Vechten*, 73 N. Y. 113. *Frith v. Cartland*, 2 Hem. & M. 417. *Isaacson v. Harwood*, L. R. 3 Ch. 225. *Holland v. Holland*, L. R. 4 Ch. 449. Perry on Trusts, §§ 345, 836-842. 2 Story, Eq. Jur. § 1258, 1259. Lewin on Trusts, (8th ed.), 241, 892.”

And in *Nichols v. Shearon*, 4 S. W. 169, which is also cited with approval in 190 Fed. 671, the court says:

“The administrator seems to have acted upon the idea that the debts were incurred in a fiduciary capacity, and that this dispensed with the necessity of their being regularly probated.

Shearon was a trustee for his wards as long as he lived. But, when he died, his indebtedness to the trust became a simple demand against his estate, which required to be sworn to, to be presented to the administrator within two years from the date of his letters, to be allowed, classified, and paid like any other debt he owed. *Hill v. State*, 23 Ark. 604; *Connelly v. Weatherly*, 33 Ark. 658; *Patterson v. McCann*, 39 Ark. 577; *Purcelly v. Carter*, 45 Ark. 299; *Padgett v. State*, Id. 495."

And in *Attorney General v. Brigham, Ex'r*, and others, 142 Mass. 248, 7 N. E. 852, the court says:

"Mr. Justice Story states the rule of law with great clearness. He says:

'Executors are charged with no more in virtue of their office than the administration of the assets of the testator. If, at the time of his death, there is any specific personal property in his hands, belonging to others, which he holds in trust or otherwise, and it can be clearly traced and distinguished from the testator's own, such property, whether it be goods, securities, stocks, or other things, is not assets to be applied in payment of his debts, or to be distributed among his heirs, but is to be held by the executor as the testator himself held it. But if the testator has money or other property in his hands belonging to others, whether in trust or otherwise, and it has no earmark, and is not distinguishable from the mass of his own property, the party must come in as a general creditor, and it falls within the description of assets of the testator.' *Trecothick v. Austin*, 4 Mason, 16.

"This rule has been adopted and recognized in several cases by this court. *Johnson v. Ames*, 11 Pick. 173; *Harlow v. Deshon*, 111 Mass. 195; *Burgess v. Keyes*, 108 Mass. 43."

By Revised Codes, § 7760, a guardian is required to give a bond, which it is alleged was done in the instant case, wherein *inter alia*, he obligates himself, i. e. covenants or contracts, to account for, and return all unused funds coming into his hands. If he fails in this, there is a breach of the obligation of the bond, a breach of the trust, and a claim because of this breach is one "arising upon contract", and is clearly, we submit, both within the letter and spirit of the Montana Non-Claim statutes. The precise point has not been, so far as we are aware, passed on by the Montana Supreme Court, but in view of the foregoing principles, and particularly in view of the California decisions, above cited, we have no doubt that that court would align itself with that of California.

That these statutes are mandatory and must be complied with and an allegation of presentation, rejection, and of course proof thereof, is indispensable; see:

Dorais v. Doll, 33 Mont. 316.

Milton v. Jones, 28 Mont. 150.

Another well considered and controlling authority on this court is that of *Morgan v. Hamlet*, 113 U. S. 449. That, too, was a claim or demand arising out of a trust relation, wherein the trustee was charged with

failure to account for, and conversion of trust funds, and the Arkansas statute was held to constitute a bar, the syllabus reading:

“That statute of Arkansas that ‘All demands not exhibited to the executor or administrator, as required by this act, before the end of two years from the granting of letters, shall be forever barred’ begins on the granting of letters of administration, to run against persons under age, out of the state with no guardian appointed within the state, and whose claims are alleged to be founded in frauds which were not discovered until after the expiration of the two years fixed by the act.”

This case has been repeatedly affirmed and followed both in the Circuit Courts and in the Supreme Court, the latest decision in the latter court being that of *Security Trust Co. v. Black River Nat'l Bank*, 187 U. S. 211, which holds that statutes like those under consideration, “are not merely rules of practice for the courts, but laws limiting the rights of parties, and will be observed by the Federal courts in the enforcement of individual rights.” (Page 229):

Citing also *Yonley v. Lavender*, 21 Wall. 276, and numerous Circuit Court decisions.

See, also:

Green v. Barrett, 123 Fed. 349.

Schurmeier v. Conn. Mut. Life Ins. Co., 124 Fed. 865.

Newberry v. Wilkinson, 190 Fed. 62, S. C. 199 Fed. 673, Nos. 1, 2.

Judge Woerner in his work, 2 American Law of Administration, § 368, states the rule in accordance with the foregoing authorities, thus, he says:

“Money held or owing by an executor, administrator, guardian, or other person sustaining a fiduciary relation at the time of his death, constitutes, in so far as such money or other property cannot be specifically traced and segregated from the decedent’s own money and property, a debt.”

And in § 402 of the same work, he says:

“The statute of Non-claim or of limitation specially to estates of deceased persons, is in most states applied more rigorously than the general statute of limitations; the administrator cannot waive it, and it has been held that the temporary absence of the executor from the state does not interrupt its course. * * * * * As between a *cestui que trust* and his trustee the statute of limitations does not usually apply; and where a trustee dies, the trust fund, if traceable in specie, constitutes no part of his estate, and is recoverable from the administrator by the successor in the trust, or person entitled to the fund, without any of the formalities prescribed for the establishment of a claim against the estate, but when such trust fund is confused with the trustee’s own property, so that its identity is lost, the *cestui que trust* or new trustee, as the case may be, stands in the position of a general creditor, to whom the statute of Non-claim applies with equal rigor as against other creditors.”

That the legislature of Montana, did not intend to distinguish between claims *ex contractu* and *ex*

delicto is clearly apparent from the terms of Rev. Codes, § 7534, which reads:

“7534. If an action is pending against the decedent at the time of his death, the plaintiff must in like manner present his claim to the executor or administrator for allowance or rejection, authenticated as required in other cases, and no recovery shall be had in the action unless proof be made of the presentations required.”

The attempted excuse for this failure to present the claim and to comply with the statutes in the present instance, i. e., because of temporary absences of the executrix from the state, is wholly insufficient, for the reason that inasmuch as the statutes make no exceptions, the courts are powerless so to do. The only exception the statute makes is want of notice of the publication on the part of the claimant by reason of his being out of the state. The rule *expressio unius est exclusio alterius* is applicable.

Savings, etc., Co. v. Bear, etc., Co., 89 Fed. 32, 40.

Douglass v. Folsom, 33 Pac. 662.

Roddan v. Doane, 92 Cal. 556, 28 Pac. 604.

And so as to a similar attempt to escape the statute, the United States Supreme Court, in *Morgan v. Hamlet*, 113 U. S. 452, says:

“The statute in question contains no exception in favor of claimants under disability of non-age, or otherwise; the claim of the complainants against John G. Morgan was adverse to his administration, although it may have originated in

consequence of a relation of trust; and there is no ground, that we are able to understand, on which it can be excepted out of the operation of the statute in question. Their claim was equally against the administrator of John G. Morgan, whether the latter be considered as the defaulting partner of themselves or of their father. Whatever its description, it was a claim against the estate of John G. Morgan, and for which his personal representative was in the first instance liable; and the statute is a bar to every such claim, unless presented within the time prescribed."

And so, too, in effect, is *Milton v. Jones*, 28 Montana 150, where the syllabus is:

"Under the direct provisions of the Code of Civil Procedure, § 2603 (Rev. Codes, § 7525), all claims against the estate of a decedent must be presented within the time limited in the administrator's notice to creditors, or they are barred forever, except when it appears by the affidavit of the claimant, to the satisfaction of the court, that he had no notice, by reason of being out of the state."

And even if the executrix had been absent from the state, still the notice, as § 7522 requires, designated a place for the transaction of the business of the estate, and a presentation there and even a rejection by the attorney of the estate, would have sufficed as a compliance with § 7525, as is held in

Dorais v. Doll, 33 Mont., 314.

Douglass v. Folsom, 33 Pac. 662.

Roddan v. Doane, 92 Cal. 556, 28 Pac. 604.

Surely the claim of complainant could just as well have been presented at the designated place, during the absence of the executrix, in the ten months after December 18th, 1908, as the bill of complaint shows it was presented in the present instance on March 14, 1913.

The courts are powerless to relieve one from the consequences of a failure to present a claim against an estate as the statute requires.

“Having omitted to do so, he has in effect waived his demand against the estate.”

In re Hincheon's Estate, 159 Cal., 755, 116 Pac. 47, 49.

II.

STATUTE OF LIMITATIONS.

The present action was begun May 17, 1913. The appellee attained his majority October 10, 1906, more than six years prior to the suit. John M. Smith died October 6, 1908. Letters testamentary were issued on his estate November 7, 1908. In his testimony in the state court appellee stated that he first learned of the facts which he claims entitled him to relief in the spring of 1907 (Transcript, p. 66). He now endeavors to show that by the term spring he meant sometime during the month of August, 1907, prior to the 15th (Id.). In either event, a period of more than five years and nine months elapsed between

said alleged discovery and the commencement of the suit. What statute of limitations is applicable? Clearly, we submit, Rev. Codes, § 6449, sub. 4, which reads: (Within two years)

“4. An action for relief on the ground of fraud or mistake, the cause of action in such case is not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake.”

To avoid the plain terms of this statute, appellee's counsel seek to avail themselves of the provisions of Rev. Codes, § 6458, viz:

“Exception, where defendant is out of the state.—If when the cause of action accrues against a person, he is out of the state, the action may be commenced within the term herein limited, after his return to the state, and if, after the cause of action accrues, he departs from the state, the time of his absence is not part of the time limited for the commencement of the action,”

in that they aver consecutive absences from the state both of John M. Smith and of the defendant executrix. But said section is an exception only in so far as the defendant himself is concerned, and it has no application to any absence of the executrix, for as is said by the Supreme Court of Montana in 40 Mont. 569:

“Section 9028, above, is a general statute of limitations, applicable to misdemeanors; and it is an elementary rule of statutory construction that an exception to such a statute cannot be

enlarged beyond what its plain language imports, and that, whenever the exception is invoked, the case made must clearly and unequivocally fall within it. (Wood on Limitations, 3d ed., sec. 252, and note.) The author just cited, after a very thorough review of the authorities, says: 'It may be safely said that the courts have no authority to make any exceptions in favor of the party, to protect him from the consequences of the statute, unless they come clearly within the letter of the saving clauses therein contained, and that the exercise of any such authority by the courts is a usurpation of legislative powers by it which is wholly unwarranted, and which courts should never resort to. By making the exceptions which exist in the statute the legislature has exercised its prerogative power, and the fact that no others were made clearly indicates that it intended that no others should exist, and the courts have no power to add any, however much the ends of justice in a particular case may demand it.'

True, the Montana supreme court was applying the rule to a criminal statute, but the quoted and approved passage from Wood on Limitations, and indeed the entire scope of the decision, apply to all statutes of limitations. In addition to the text from Wood quoted in the above opinion, we also quote from the footnote thereto, viz:

"The appellant contends that when exceptions are provided to a general statute it excludes all others than those expressed, and that courts are not at liberty to ingraft other exceptions than those expressed, upon such a statute.

This claim finds strong support in the following cases cited by counsel: *Chemical Nat. Bank v. Kissanne*, 32 Fed. Rep. 429; *Engel v. Fischer*, 102 N. Y. 400, 3 Cent. Rep. 303; *Fee v. Fee*, 10 Ohio, 470; *Amy v. Watertown*, 130 U. S. 320, 22 Fed. Rep. 418; *Alabama Bank v. Dalton*, 9 How. (U. S.) 526; *Kendall v. United States* 107 U. S. 123; *Favorite v. Booher*, 17 Ohio St. 548; *Woodbury v. Shackelford*, 19 Wis. 55; *Somerset Co. v. Veghte*, 44 N. J. 509; *Demarest v. Wynkoop*, 3 Johns. Ch. 129; *Miles v. Berry*, 1 Hill, L. 296; *Troup v. Smith*, 20 Johns, 33. These questions were presented and passed upon in a number of those cases, holding that the general statute excludes all others, and that when the legislature has made exceptions the courts can make none. *Campbell v. Long*, 20 Iowa, 382; *Shorick v. Bruce*, 21 Iowa, 307; *Relf v. Eberly*, 23 Iowa, 469; *Gebhard v. Sattler*, 40 Iowa, 152; *Miller v. Lesser*, 71 Iowa, 147."

The rule that exceptions to the statute of limitations are to be strictly construed, and that implied and equitable exceptions are not to be engrafted on the statute, where the legislature has not made the exceptions in express words, is very clearly set forth in *Lawson v. Tripp*, 95 Pac. 520, 522, where the court said:

"While the general rule is that statutes of limitation generally are to be liberally construed, it is also a well-recognized doctrine that, when such statutes contain provisions excepting certain persons or classes from the operation of the statutes, those exceptions are to be strictly construed. And courts will not by construction ex-

tend the exception so as to include persons not expressly mentioned therein. Black, in his work on Interpretation of Laws, p. 332, referring to statutes of limitation, says: 'But if the statute itself is to be construed liberally, necessarily it follows that the exceptions which it makes in favor of particular persons or classes are to be construed with strictness. Accordingly the doctrine is now very fully established that implied and equitable exceptions are not to be ingrafted upon the statute of limitations where the legislature has not made the exception in express words in the statute; the courts cannot allow them on the ground that they are within the reason or equity of the statute.' In *McIver v. Ragan*, 2 Wheat. 24, 4 L. Ed. 175, the Supreme Court of the United States, speaking through Chief Justice Marshall, says: 'Wherever the situation of a party was such as, in the opinion of the Legislature, to furnish a motive for excepting him from the operation of the law, the Legislature has made the exception. It would be going far for this court to add to those exceptions. It is admitted that the case of the plaintiff is not within them, but it is contended to be within the same equity with those which have been taken out of the statute.' The court then refers to the difficulties to plaintiff and parties similarly situated because of the strict construction placed on the statute by the trial court, and says: 'If this difficulty be produced by the legislative power, the same power might provide a remedy; but courts cannot, on that account, insert in the statute of limitations an exception which the statute does not contain.' 25 Cyc. 990; *Allen v. Mille*, 17 Wend.

(N. Y.) 202; *Bedell v. Janney*, 9 Ill. 193; *Favorite v. Booher's Adm'r*, 17 Ohio St. 548; *Dozier v. Ellis*, 28 Miss. 730; *Sacia v. DeGraaf*, 1 Cow. (N. Y.) 356; *Amy v. City (C. C.)* 22 Fed. 418; *Pryor v. Ryburn*, 16 Ark. 671; *Buswell, Lim. & Adv. Poss.* 16."

See also *Norris v. Haggin* (Judge Sawyer), 28 Fed. 275, 282, and *Amy v. City of Watertown*, 22 Fed. 418, which was affirmed in 130 U. S. 320, 326, where the Supreme Court on this point says:

"Inability to serve process on a defendant has never been deemed an excuse for not commencing an action within the prescribed period. The statute of James made no exception to its own operation in case where the defendant departed out of the realm, and could not be served with process. Hence the courts held that absence from the realm did not prevent the statute from running. *Wilkinson on Limitation*, 40; *Hall v. Wyborn* 1 Shower, 98. This difficulty was remedied by the act of 4 and 5 Anne, c. 16, § 19, which declares that if any person against whom there shall be any cause of action be at the time such action accrued beyond the seas, the action may be brought against him after his return, within the time limited for bringing such actions. Most of the states have similar acts. The statute of Wisconsin, as we have seen, has a similar provision; perhaps wider in its scope. That statute, therefore, has expressly provided for the case of inability to serve process occasioned by the defendant's absence from the state. It has provided for no other case of inability to make service. If this is an omission, the courts cannot sup-

ply it. That is for the legislature to do. Mere effort on the part of the defendant to evade service surely cannot be a valid answer to the statutory bar. The plaintiff must sue out his process and take those steps which the law provides for commencing an action and keeping it alive.”

We have seen that absence of the executor, or administrator, from the state, does not preclude or excuse the presentation of a claim against the estate; that 10 days non-action thereon is to be regarded as a rejection; and that suit thereafter must be brought within three months, or be forever barred (Rev. Codes, § 7530); there appears, then, no reason why the claim could not have been presented, prior to November, 1909, even though the executrix was without the state, after the notice to creditors, on December 18, 1908, and a suit, at least, have been begun within the statutory three months after the rejection, and personal service of process thereon could have been had during the five months of May, June, July, August and September of 1909, when she was confessedly within the state (See Stipulation, Transcript, p. 62), and subject to personal service of process, or for that matter, such service could have been had at any time during her presence within the state. Her absence from the state did not deprive the plaintiff of a remedy, for in addition to her presence within the state during the periods mentioned, this being an equitable action, if personal service had been impossible, which clearly it was not, an order of court for constructive service

could have been obtained, in that the plaintiff's claim is against property confessedly within the district. Upon this point the doctrine of *Seculovich v. Morton*, 36 Pac. 387, is applicable, viz:

"The defendant's absence from the state did not deprive the plaintiff of a remedy. He might have invoked the authority of the court, and, upon service of process in the manner prescribed by the statute, could have procured the appointment of a commissioner to convey the property to him. *Perkins v. Wakeham*, 86 Cal. 580, 25 Pac. 51; *Applegate v. Mining Co.*, 117 U. S. 266, 6 Sup. Ct. 742; *Arndt v. Griggs*, 134 U. S. 320, 10 Sup. Ct. 557; *Adams v. Cowles*, 95 Mo. 501, 8 S. W. 711; *Felch v. Hooper*, 119 Mass. 52."

It is conceded that five months of the statute had run prior to the death of John M. Smith, and that the statute had begun to run again on November 8, 1909, but that was more than three years and six months, or with said five months, more than three years and eleven months, whereas the statute unquestionably applicable limits such an action to two years. See *Lataillade v. Orena*, 27 Pac. 924, in which the prototype of Rev. Codes, § 6449 sub. 4, under substantially similar facts is construed.

Again, an executrix may not be identified with the defendant referred to in said § 6458, for as it is said in *Ward v. Magaha*, 129 Pac. 397:

"The general rule is that *an executor is a trustee for the heirs, and in no sense stands in the shoes of the deceased, that he is bound by the*

statute, and cannot waive as against the heirs or devisees any requirement of the statute. 18 Cyc. 500; 11 A. & E. Enc. Law, 924; Cockrell v. Seasongood (Miss.), 33 South. 77; Fitzgerald v. Nat. Bank, 64 Neb. 260, 89 N. W. 813 (syllabus); Winchell v. Sanger, 73 Conn. 399, 47 Atl. 706, 66 L. R. A. 935; Farwell v. Richardson, 10 N. D. 34, 84 N. W. 558; Miller v. Ewing, 68 Ohio St. 176, 67 N. E. 292; Thompson v. Hoxsie, 25 R. I. 377, 55 Atl. 930."

And this, too, is the holding in Montana, for in Vanderpool v. Vanderpool, 138 Pac. 772, 774, the Supreme Court of that state says:

"These statutes of non-claim are special in character; they supersede the general statutes of limitations, and compliance with their requirements is essential to the foundation of any right of action against an estate upon a cause of action which sounds in contract. The executor or administrator is in effect a trustee of the funds of the estate for the benefit of the creditors and heirs, and cannot waive any substantial right which materially affects their interests, and, for the same reason, cannot be estopped by his own conduct. He cannot, by failure to plead the statute of nonclaim as against one who sues upon a claim which has not been properly presented, preclude the heirs or other creditors of the estate from setting it up upon settlement of his accounts (In re Mouillerat's Estate, 14 Mont. 245, 36 Pac. 185), and he renders himself personally liable for devastavit in case of payment of such a claim. While an equitable estoppel might be invoked as against an executor or administrator so far as his

individual interest in the estate is concerned, it cannot operate to the prejudice of the heirs or other creditors. Even his misleading statements, his assurances or his conduct which induces a creditor to omit compliance with the statute, will not operate to estop him from contesting the claim upon the ground of noncompliance. The reason for these rules ought to be manifest at once, and with reference to them there is substantial unanimity of opinion among the authorities. 2 Woerner's American Law of Administration, § 387; Kells v. Lewis, 91 Iowa, 128, 58 N. W. 1074; Spaulding v. Suss, 4 Mo. App. 541.

When the various provisions of the Montana statutes relating to claims against an estate and the limitations thereto are considered it will be readily seen that the exception in § 6458 has no application to executors. Thus in Rev. Codes, § 6460, it is provided:

"If a person against whom an action may be brought, dies before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced against his representatives after the expiration of that time, and within one year after the issuing of letters testamentary or of administration."

And in § 6461:

"Where person dies out of state.—If a person against whom a cause of action exists, dies, without the state, the time which elapses between his death, and the expiration of one year, after the issuing, within the state, of letters testamen-

tary or letters of administration, is not a part of the time limited for the commencement of an action therefor, against his executor or administrator.”

See also Rev. Codes, §§ 7522, 7523, 7525, 7526, 7528, 7530, 7531, 7532, 7533, and 7534.

The statute applies to suits in equity.

Mantle v. Speculator M. Co., 27 Mont., 476;

Wood on Limitations, § 58;

and

“All courts of the United States, in the absence of legislation by Congress on the subject, recognize the statutes of limitations of the several states, and give them the same construction and effect as are given by the local tribunals. They are a rule of decision under § 34 of the Judicial Act of 1879; and, as the construction given to a statute by a state by its highest judicial tribunal is regarded as a part of the statute, and is as binding upon the courts of the United States as the text, new views adopted by such high tribunals as to the construction of such a statute, though reversing its former decisions, are followed by the U. S. Supreme Court. *Leffingwell vs. Warren*, 2 Black. (U. S.) 599, 603; *Bauserman v. Blunt*, 147 U. S. 647, 653; *Brady v. Daly*, 175 U. S. 148, 158; *Balkam v. Woodstock Iron Co.*, 154 U. S. 177, 189.”

Wood on Limitations, note to § 40a on pages 98, 99.

See also *Newberry v. Wilkinson*, 190 Fed. 62, 199 Fed. 673.

Now John M. Smith died at Battle Creek, Michigan, October 6, 1908. Letters testamentary were issued November 7, 1908. Doubtless his absences from the state subsequent to the accrual of the cause of action, say seven months in 1908, should be deducted, but whether any period should be deducted for 1907, is questionable, for if the accrual of the action was in August, 1907, there could be only some four months in that year and he was present in the state four months as per the stipulation (Transcript, p. 62), and inasmuch as absence of the defendant from the state is exceptional in its character, the four months of his presence here should be presumed to have been after the accrual of the cause of action.

Bass v. Berry, 51 Cal. 265.

But conceding for the sake of argument the four months absence in favor of appellee we have four months in 1907, seven months in 1908, one month between the death and the letters, a total of twelve months, to which should be added the one year after the letters as provided in § 6460; so it would appear then, that the action should have been commenced prior to November 7, 1909, or at any rate long before May 17, 1913.

Despite the views above expressed the learned district judge sought to and has construed Rev. Codes (Mont.) § 6458 as including within its meaning other persons than those therein designated, and yet he admits in his opinion (Transcript, p. 192) "And though

the literal reading of § 6458, *supra*, may support defendant's contention (i. e., that only those persons mentioned in said section are excepted from the general statute of limitations), it must yield to what must be assumed to have been the legislative intent, that is, to suspend limitations whenever absence from the state of the party defendant, be he debtor or personal representative, prevents effective prosecution of a cause of action." Now with all due respect, it is submitted that this view is wholly fallacious. It cannot be disputed that in the construction of its own statutes the views of the Supreme Court of the State of Montana are paramount and binding, and in construing this particular statute (§ 6458) that court has said in *State v. Clemens*, 40 Mont. 567, 569:

"It may be safely said that the courts have no authority to make any exceptions in favor of the party, to protect him from the consequences of the statute, *unless they come within the letter of the saving clauses therein contained*," etc. (Italics ours).

So when it is admitted, as the excerpt from the aforesaid opinion does, that defendant's (appellant's) contention finds support in the literal reading of the statute, it is clearly contrary to the said decision of the Supreme Court of Montana, to reject such contention and to read into the statute, something, i. e., the words "personal representative" or words of like import, which all rules of construction inhibit, and par-

ticularly Revised Codes of Montana, § 7875, which reads:

“In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted.”

Nor is the case helped out by the reference of the lower court to Rev. Codes, § 6214, which reads:

“The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this code. The code establishes the law of this state respecting the subjects to which it relates, and its provisions are to be liberally construed with a view to effect its objects and to promote justice,”

for here we have nothing to do with the common law, but with a statute, one, too, of which the Supreme Court of the state has said, reading from the syllabus:

“An exception to a statute of limitations cannot be enlarged beyond what its plain language imports, and, when invoked, the case must clearly and unequivocally fall within it.”

State v. Clemens, 40 Mont. 567.

We have seen that the executor of an estate does not stand in the shoes of the decedent, does not represent him, but that he is the representative first of the creditors, and second of the heirs, devisees or legatees of the decedent.

Ward v. Magaha, 129 Pac. 397,

and cases cited;

Vanderpool v. Vanderpool (Mont.), 138 Pac.
772, 774.

It is easily conceivable that the interest of creditors may be hostile to that of decedent and to those deriving property from him either by descent or purchase, so by the construction placed on the exception statute by the lower court not only is there inserted into that statute a person other than the one mentioned therein, but the representative of an entirely distinct and hostile class of persons. Surely this can not logically be said to have been the intent of the legislature in adopting said statute and the *ratio decidendi* of the lower court in that regard is strained and unwarranted. If it is the law, as it certainly is, that an executor cannot waive the statutory requirements concerning claims against the estate of a deceased person; if he cannot estop himself or the estate by misleading statements, assurances or conduct, as is held in Vanderpool v. Vanderpool (Mont.), 138 Pac. 774; if he cannot waive the bar of the statute of limitations, as both he and the judge passing on the claim are by statute prohibited from doing, Rev. Codes, Montana, § 7531, then it must logically follow that he cannot suspend the running of the statute by absenting himself from the state. Nor can it be said, as intimated in the opinion of the lower court, that a claimant against an estate is in such case without remedy, for as we have seen, the Montana decisions are to the effect that

claims against an estate for allowance or rejection may be presented at the place designated in the statutory notice to claimants,

Dorais v. Doll, 33 Mont. 314;

Douglass v. Folsom, 33 Pac. 662;

Roddan v. Doane, 92 Cal. 556, 28 Pac. 604;

And if a suit should become necessary thereon, an order for constructive service might be obtained.

Seculovich v. Morton, 36 Pac. 387,

or, upon application to the court, the absent or derelict executor might be removed and an administrator *cum testamento annexo* be appointed in his stead. Ample authority for this course is provided for by the statutes, Rev. Codes (Mont.), §§ 7488-7492, and by general law, see 1 Woerner Am. Law of Adm. § 270, on page 576.

It would serve no useful purpose to review the authorities cited in support of the views of the district court on this point, all of which we have carefully read, because they are avowedly based upon a construction of statutes peculiar to the respective states whence they emanate, and in none of them was the limitation and rule announced and emphasized in 40 Montana, 567 *supra*, adverted to or considered.

III.

LACHES.

The present case is an action in equity. Now one of the cardinal rules in equity is, as stated in

Kavanaugh v. Flavin, 35 Mont. 137:

“The plaintiff sought the aid of a court in equity and is bound by the principles applicable to proceedings in equity. It is a familiar maxim that equity aids the vigilant, or, as the same thing is expressed in our Civil Code (section 4618), ‘the law helps the vigilant, before those who sleep on their own rights.’

“Good faith and reasonable diligence only can call into activity the powers of a court of equity, and, independently of the period fixed by the statute of limitations, stale demands will not be entertained or relief granted to one who has slept upon his rights. Considerations of public policy and the difficulty of doing justice between the parties are sufficient to warrant a court of equity in refusing to institute an investigation where the lapse of time in the assertion of the claim is such as to show inexcusable neglect on the part of the plaintiff, no matter how apparently just his claim may be; and this is particularly so where the relations of the parties have been materially altered in the meantime.”

This is a substantial defense, and it may be raised by a motion to dismiss, by a motion for nonsuit, or by a motion for judgment for defendant. It is independent of the statute of limitations, and may be availed of in a far shorter period than is thereby prescribed. If it is apparent, or deducible from the plaintiff's statement of his case, he must allege and prove a good and substantial excuse for his delay. Appellee's counsel evidently saw the infirmity of his case in this regard, and sought to obviate it in the

bill of complaint, at least in part, by stating "that he has not been guilty of any laches in this matter", which is but the statement of a bald conclusion of law, and is consequently wholly insufficient, and by stating "that his failure to present a claim sooner against the estate was due to the fact that he believed that he had a good cause of action to set aside the sale of the property to the said John M. Smith by the executor of the estate of William A. Smith aforesaid; that he did bring a suit for the said purpose within one year after his majority, to-wit, in the month of August, 1907, and that the said suit was pending in the courts of this state until the 14th day of November, 1912; that said suit has been dismissed."

Bill of Complaint, Transcript, p. 14. Further, in said bill of complaint, he states: "As far as his information or understanding went, that any fraud had been committed upon him or upon his sisters, and that he did not discover or learn of the fact until the month of August, 1907."

Bill of Complaint, Transcript, p. 13. In his testimony upon the trial in the state court, which was read to him while he was testifying in the present case, Transcript, pp. 66-67, he said he first learned of the facts in the spring of 1907, at any rate it was prior to August 15, 1907. He attained his majority in October, 1906; he was fully aware of all the facts on and prior to August, 1907; John M. Smith was alive until October 6, 1908; he had ample opportunity to

bring an action, similar to the present one during the lifetime of defendant's testator, yet he refrained from so doing and further delayed action until more than four years and seven months after the death of the participant and most important witness. The authorities are as one in condemnation of delay under such circumstances. Thus in *Mackall v. Casilear*, 137 U. S., 566, the court said:

"The doctrine of laches is based upon grounds of public policy, which require for the peace of society the discouragement of stale demands. And where the difficulty of doing entire justice by reason of the death of the principal witness or witnesses, or from the original transactions having become obscured by time, is attributable to gross negligence or deliberate delay, a court of equity will not aid a party whose application is thus destitute of conscience, good faith and reasonable diligence. *Jenkins v. Pye*, 12 Pet. 241; *McKnight v. Taylor*, 1 How. 161, 168; *Godden v. Kimmell*, 99 U. S. 201; *Landsdale v. Smith*, 106 U. S. 391; *Le Gendre v. Byrnes*, 44 N. J. Eq. 372; *Wilkinson v. Sherman*, 45 N. J. Eq. 413.

"The time for this son to have attacked his father on the ground of fraud was prior to that father's death; yet no movement was made to set aside these alleged fraudulent conveyances, until five years after that event transpired."

And in *Kavanaugh v. Flavin*, 35 Mont., 138, the following citation from the Supreme Court of the United States is approvingly made:

"Speaking upon the subject of laches, the

supreme court of the United States, in *Hammond v. Hopkins*, 143 U. S. 224, 12 Sup. Ct. 418, 36 L. Ed. 134, said: 'No rule of law is better settled than that a court of equity will not aid a party whose application is destitute of conscience, good faith, and reasonable diligence, but will discourage stale demands, for the peace of society, by refusing to interfere where there have been gross laches in prosecuting rights, or where long acquiescence in the assertion of adverse rights has occurred. The rule is peculiarly applicable where the difficulty of doing entire justice arises through the death of the principal participants in the transactions complained of, or of the witness or witnesses, or by reason of the original transactions having become so obscured by time as to render the ascertainment of the exact facts impossible. Each case must necessarily be governed by its own circumstances, since, though the lapse of a few years may be sufficient to defeat the action in one case, a longer period may be held requisite in another, dependent upon the situation of the parties, the extent of their knowledge or means of information, great changes in values, the want of probable grounds for the imputation of intentional fraud, the destruction of specific testimony, the absence of any reasonable impediment or hindrance to the assertion of the alleged rights, and the like. (*Marsh v. Whitmore*, 88 U. S. (21 Wall.) 178, 22 L. Ed. 482; *Lansdale v. Smith*, 106 U. S. 391, 1 Sup. Ct. 350, 27 L. Ed. 219; *Norris v. Haggin*, 136 U. S. 386, 10 Sup. Ct. 942, 34 L. Ed. 424; *Mackall v. Casilear*, 137 U. S. 556, 11 Sup. Ct. 178, 34 L. Ed. 776; *Hanner v. Moulton*, 138 U. S. 486, 11 Sup. Ct. 408, 34 L. Ed. 1032.)' "

The excuse here offered is wholly insufficient in that it simply amounts to an allegation that he was ignorant of the law, as applied by the courts of the state, to the facts and statutes of the state which were involved in his said first suit. Ignorance of the law excuses no one. Indeed, we submit, that it is apparent that only after his defeat in an attempt to secure a much larger portion of the defendant's estate, was the present action conceived. It is further apparent that if the action had been instituted during the lifetime of defendant's testator and even if he had succeeded in sustaining it a far less sum in the form of interest would have been recoverable. Even in actions at law it is the rule in the federal courts to withhold interest, if there has been any long delay in the assertion of a claim. See:

Redfield v. Ystalyfera, etc., Co., 110 U. S. 174.

United States v. Sanborn, 135 U. S. 271;

Redfield v. Bartels, 139 U. S. 702;

which cases have frequently been applied in the various courts. See note 3 Digest U. S. Supreme Ct. Reports, Title Interest, No's 80, 81.

IV.

PLEA OF FORMER ADJUDICATION.

The appellant contends that the subject matter of the present suit has already been determined by a former adjudication between the same parties.

In paragraph 9 of the answer, appellant pleads the judgment of the District Court of the Tenth Judicial District of the State of Montana, duly made and given on the 15th day of September, 1911, against the appellee and in favor of the appellant herein; that said judgment of said court, was, on the 10th day of June, 1912, on an appeal taken by the appellee herein, duly affirmed by the Supreme Court of Montana; that on the 14th day of November, 1912, a petition for rehearing, filed by appellee herein, was by said court overruled and denied; and that by said judgment of said District Court, by the decision of the Supreme Court of the State of Montana, rendered on the appeal from said judgment, all matters and things and causes of action set out in the bill of complaint herein were determined in favor of this appellant and against the appellee herein.

The general principles which control when a former judgment is pleaded as an estoppel have often been announced by the Supreme Court of the United States.

In *New Orleans vs. Citizens Bank*, 167 U. S. 371, 396, the court says:

“In *Cromwell vs. Sac County*, 94 U. S. 351, 353, after a full statement of the nature of the estoppel resulting from the thing adjudged where the demand was the same in both cases, the court then considered the extent of the estoppel where the causes of action were distinct and said: ‘But where the second action between the same parties

is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to the matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action.’ ”

Again, in the case of *Southern Pacific R. Co. vs. United States*, 168 U. S., 48-49, the court said:

“The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact, unless so determined, must, as between the same parties or their privies, be taken as conclusively established so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established which is to secure the peace and repose of society by the settlement of matters capable of judicial jurisdiction. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked

for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them."

Again, in *Troxell v. Delaware L. & W. R. Company*, 227 U. S., 440, the court says:

"Where the second suit is upon the same cause of action set up in the first, an estoppel by judgment arises in respect to every matter offered or received in evidence, or which might have been offered, to sustain or defeat the claim in controversy; but, where the second suit is upon a different claim or demand the prior judgment operates as an estoppel only as to matters in issue or points controverted and actually determined in the original suit."

In the instant case the question then is, what matters were in issue or what points controverted and actually determined in the original suit in the state court between the parties to this action.

Counsel for appellee, on the hearing before this court, declared that the purpose of this present suit was to have reopened the final account of John M. Smith, as guardian for the complainant, filed in the District Court of Meagher County, State of Montana, on December 11th, 1906, and approved by said court shortly thereafter, and also to recover interest on all moneys of the appellee used by John M. Smith, as guardian. And it is of moment to determine whether or not the validity of the order of the District Court of said

County of Meagher, made on the 11th day of December, 1900, allowing John M. Smith to borrow and use the guardianship funds in his hands; and whether or not the order of said court approving the final account of John M. Smith, as guardian of appellee, and discharging him as guardian were not held and declared to be valid orders by the judgments of both the District Court and the Supreme Court of the state of Montana, above referred to.

With reference to the order of December 11, 1900, it appears from finding of fact No. 54, page 48, of the record on appeal in the case of Smith vs. Smith:

“That on or about June, 1899, J. M. Smith spoke with Judge Armstrong about using the guardianship moneys at four per cent.” (Transcript, p. 110.)

And from finding No. 56, pages 48-49, of said record on appeal:

“That on December 11th, 1900, the order allowing John M. Smith, the guardian, to use the money in his hands at three per cent interest per annum was made and entered.” (Transcript, p. 110.)

And that the question of the validity of said order and the question of appellee's right to charge John M. with interest were presented to the court on the appeal to the Supreme Court of the state of Montana, appears from an examination of pages 24, 25, 43, 71-75, 105-6 and 113, of appellee's brief in that case (Transcript,

p. 171), and from appellee's assignment of error No. 14, page 60, of his brief, which is as follows:

"It was error in the court not to hold and find, and to decree accordingly, that under any circumstances the defendant, John M. Smith, and his successor in interest, should account to the appellant for the full value of the use of the money of the appellant at the current rates of interest charged by banks during the time that he had the use of such money." (Transcript, p. 172.)

The validity of said order is attacked in express words on pages 43 to 106 of appellee's said brief.

The question of interest is referred to on pages 2, 5, 7, 8, 14, 16, 25, 27, 31 and 32, of appellee's petition for rehearing in said cause (Transcript, pp. 172-173), and the question of the validity of said order of December 11, 1900, is questioned on pages 6, 7, 17, 19, 20, 22, 23, and 24, of said petition for rehearing.

It further appears from an examination of appellee's brief filed in the Supreme Court of the state of Montana, in said cause of Smith vs. Smith, that the decree of final discharge of John M. Smith, as guardian, was urged and sought to be declared to be void and of no effect on pages 124, 125, 126, 127 and 128, of said briefs.

An examination of the brief of the respondent, filed in the Supreme Court of the state of Montana, in said cause, will show that every point and matter

urged herein by the appellee as a reason why said judgment of said District Court should be reversed was contested by respondent (appellant). The court is referred particularly to pages 106, 107, 196, and 197, thereof.

That all the questions now urged by counsel for appellee in this suit were urged by his counsel on said appeal in the case of Smith vs. Smith, and were determined, appears from an examination of the decision of said court in said cause reported on 45 Montana, page 535.

In the first place it is to be noted that the Supreme Court of the state of Montana adopts as its statement of facts the statement of facts from the opinion in the case of Moore vs. Smith, 182 Fed. 540. This statement recites the making of the order on December 11th, 1900, allowing John M. Smith to use the money of the minors (Opinion, p. 563); that John M. Smith, as guardian, settled his final account with plaintiff on the same basis employed on settlement with Nellie Mae Moore, to-wit: Three per cent interest on the principal sum held by him from December 11, 1900. (Opinion, p. 569.)

The court then says:

“The United States Circuit Court of Appeals decided that the sale of the stock of the estate of the deceased, William A. Smith and the subsequent misappropriation of the money of the minors by their guardian were parts and parcels

of a scheme entered into by and between N. B. and John M. Smith, which was a fraud upon the minors and the Probate (District) Court."

"Judge Hunt who tried the Moore case in the Federal District Court and Judge Stewart who heard this case in the Meagher County District Court were in the opposite opinion; that is to say, in their judgment there was no fraud, collusion or conspiracy and the sale was in all respects legal, regular and free from fraud."

On page 578 of their opinion, the state supreme court says:

"It is very clear to us (1) that neither John M. Smith nor Napoleon B. Smith ever had any intention or design to defraud the children or to gain any advantage over them. Indeed, in our opinion, all of their correspondence and actions indicate a most praiseworthy solicitude for their material welfare. (2) The property was sold for its full market value and the children suffered no detriment whatsoever on account of the sale. We believe that both John M. Smith and Napoleon B. Smith acted with the utmost good faith in the premises, that they exercised sound judgment as to the affairs of the children, and constantly had in mind the fact that they were dealing with a trust estate and ought not to jeopardize it by taking any chances of its being diminished or lost while in their care. . . . We do not think that any of the main deductions of fact drawn by the appellant are justified in the evidence."

On page 579, the said court says:

“We cannot believe that this old man was engaged in a fraudulent conspiracy to defraud his brother’s orphan children. Moreover, the facts show they have not been defrauded. Their property was sold to the only purchaser who could be found who was willing to give as much as \$85,000.00, the full value thereof; and that sum, after deducting expenses of administration, has been *fully paid them*.”

The statement found on page 579, of said opinion, to-wit:

“It may be that upon settlement of the guardian’s accounts he should have been required to pay a greater rate of interest and for a longer period of time than was actually required of him, but the question is not before us,”

is, in effect, an affirmance of the order of the district court approving the final account of John M. Smith as guardian of complainant; doubtless upon the principle that the order of the District Court approving said account was a final order made by a court having jurisdiction of the subject matter, and so, conclusive upon all whom it concerned in the absence of an appeal therefrom.

Grignons Lessee vs. Astor, 2 How. 338;

State vs. District Court, 34 Mont. 102;

Simmons vs. Saul, 138 U. S., 447, 450, 451, 453-4.

However, as clearly appears from the opinion of the state Supreme Court, the question of addi-

tional interest and the liability of the executrix of the estate of John M. Smith to account therefor, assigned as error by appellant in said suit in paragraph 14, of their assignments of error, appellant's brief, page 69, was directly passed upon adversely to appellant, therein.

On page 580, of its opinion, in said cause, the Supreme Court of the state says:

"But it is contended that the plan adopted by John M. Smith of using guardianship funds to take up his personal indebtedness to the bank was fraudulent and void as a matter of law. In this connection it may be well to note that aside from the question of the rate of interest that should have been exacted from John M. Smith as guardian, the equities of the case are all with the respondents. The appellant is attempting, in a court of equity, to overturn and set aside a purchase of property sold in good faith, for its full value, every dollar of which has been accounted for, because, as he claims, his guardian used his money for a short time, in order to effect the purchase. In fact, *this consideration is of no moment whatsoever, so far as the result to the appellant is concerned.* Not any of his property was embezzled or withheld. All of it was duly and regularly accounted for when he became of age, and turned over to him. During the latter years of his minority he took no chances of the sheep industry being affected by adverse legislation; he was fully protected from loss; if John M. Smith had continued to pay interest on the amounts temporarily borrowed from the bank and

had allowed the guardianship funds to lie idle, or if he had sold out the entire holdings of the sheep company, as contemplated, the result to the appellant would have been exactly the same as that brought about by the course of procedure actually adopted. If the appellant had been defrauded in fact, or if he had lost anything by reason of the methods pursued by his guardian, he would be in altogether different situation; but such is not the case.”

Again, on page 581, of its opinion, the court says:

“Even if we assume that he was not justified in using the funds as he did, and that he thereby technically appropriated them to his own use, yet we must look to the ultimate result of his actions in order to correctly judge of the effect thereof upon the instant controversy. It is impossible for us to believe that a guardian who had given ample security to account for all funds coming into his hands, who was personally able to raise the amount thereof on demand, who sincerely believed that he was acting legally and for the best interests of his wards, *and who did, in fact, fully account for all moneys paid over to him*, should or could be adjudged guilty of a heinous crime in a subsequent suit by one who has not lost or suffered by his conduct.

“The particular infirmity in the case of the plaintiff is that he is attempting to avoid the sale for a purely technical reason; a reason based in facts arising after the sale was complete, and which had no effect whatsoever upon the sale itself. It is claimed that this may be done because the whole course of action was fraudulent and therefore void; that the subsequent use of his

money, pursuant to a prior design to so employ it, vitiated the sale theretofore made. But his premises are defective. Not any fraud in fact was contemplated or practiced in any part of the proceedings; at most a mistake was made by the guardian as to his right to so use the money; and a technical violation of duty on his part may not now be employed to overturn a transaction otherwise regular and legal, *by which no one had suffered any injury.*"

It is true that respondent in that case contended that the question of the liability of the defendant executrix to account for additional interest was not a matter which could be considered on the appeal to the state Supreme Court, since the theory of the appellant (appellee herein) was that the sale was void, while the claim of additional interest and the liability of the respondent to account therefor proceeded upon the theory of a valid sale. The Supreme Court, however, held that the question of interest was before it and decided that question against appellee, as appears from those portions of the opinion of the court quoted above.

Counsel for appellee so interpreted the opinion of the Supreme Court, as is manifest from a consideration of their petition for a rehearing.

On page 580, of its opinion, the Supreme Court of the state says that the appellee was not defrauded, in fact, and lost nothing by reason of the methods employed by his guardian. Counsel for appellee, on

pages 25-27 of their petition for a rehearing combat this holding of the Supreme Court and contend that John M. Smith by his use of the guardianship funds saved \$35,700; and on pages 31-39, of said petition, urged the court to change its holding and direct as alternative relief "an accounting for interest unjustly withheld from him (appellee) upon the settlement" of December, 1906. They say:

"One of the purposes of the action was to annul the settlement made with appellant and to have the sale adjudged void because of the circumstances and conditions under which the stock was bought and paid for. The court adjudicates, should it grant the alternative relief, that the settlement should be set aside, but that, in view of the circumstances under which the stock was bought and paid for, the further appropriate redress is an accounting for the purchase money and interest from the time the guardian used it, that his use of it entitles the appellant not to overturn the sale but to have interest at a proper rate and for the full period of its use."

Petition for Rehearing, pages 34-35.

Manifestly, the Supreme Court of the state, when it denied appellee's petition for rehearing, held, as it did in its original opinion, that the settlement between John M. Smith and the appellant, complainant and appellee herein, should not be set aside and that he, as alternative relief, was not entitled to an accounting for the purchase money and interest thereon from the time the guardian used it at any rate other than the

rate allowed by the court in its order settling the final account of John M. Smith, as guardian.

On page 38, of said petition, counsel say:

“Coupled with sanction of a procedure by which the guardian charged himself with interest at three per cent. annually, the lamentable evil of the court’s holding, it is impossible adequately to estimate.”

When the Supreme Court denied appellee’s petition for rehearing, it in effect held that the procedure by which the guardian charged himself with interest at three per cent. was not a “lamentable evil”, but, in fact, a just holding under the facts and circumstances and the orders of the District Court made in the premises.

Upon this branch of the case we submit that every right, question or fact put in issue on this appeal was in issue on the appeal to the state supreme court and was directly determined adversely to the complainant and appellee herein.

V.

THE ORDER OF DECEMBER 11TH, 1900, AND THE ORDER OF FINAL DISCHARGE.

Complainant and appellee, contends that the order of December 11th, 1900, allowing John M. Smith to borrow the guardianship funds and the order approving the final account of the guardian and discharging him are void.

The first order is attacked on the ground of fraud and for want of jurisdiction to make it; the second for want of jurisdiction.

As we have seen, these very questions were presented to the Supreme Court of the state on appeal and there decided against appellee.

But aside from this the orders in question, having been made by a court having jurisdiction of the parties and of the subject matter, can be impeached collaterally only for fraud. And the question of fraud has been forever eliminated from the case by the decision of the State Supreme Court, above referred to, when it said:

“The appellant is attempting in a court of equity to set aside a purchase of property *sold in good faith*, for its full value, *every dollar of which has been accounted for*, because, as he claims, his guardian used his money for a short time, in order to effect the purchase. In fact this consideration is of no moment whatsoever, so far as the result to the appellant is concerned. *Not any of his property was embezzled or withheld. All of it was duly and regularly accounted for when he became of age, and turned over to him.*”

“John M. Smith, *as guardian, settled his final account* with the plaintiff on the same basis employed in settlement with Nellie Mae Moore, to-wit, *three per cent interest* on the principal sum held by him from December 11, 1900.”

Smith v. Smith, 45 Mont. on pp. 580, 569.

When the court recites in its opinion the basis upon which John M. Smith settled with the plaintiff, appellee herein, and then declares that "all of his property was *duly and regularly accounted* for when he became of age, and turned over to him," we have a direct adjudication that the final settlement was correct; that the order of December 11, 1900, was a valid order and that there was an utter absence of fraud from the whole transaction. If the final account was true and correct and the order approving the same was duly made, as the court must have found was the case in order to hold that John M. Smith "duly and regularly accounted with plaintiff for all the moneys he received" then it is of no moment here that the guardian of complainant received his final discharge before the end of a year from the approval of his final account with complainant.

If the order of final discharge was based upon a mistake of law it can not be collaterally impeached.

Fauntleroy v. Lum, 210 U. S., 230, 237.

In making the order of December 11, 1900, and that approving the final account of the guardian and ordering his discharge, the state District Court had jurisdiction of the subject matter.

Such being the case:

"The general and well settled rule of law in such cases is, that when the proceedings are collaterally drawn in question and it appears upon

the face of them that the subject matter was within the jurisdiction of the court, they are voidable only. The errors or irregularities, if any exist, are to be corrected by some direct proceeding, either before the same court to set them aside or in an appellate court.”

Thompson v. Tolmie, 2 Pet. 167.

In the case of Grignon’s Lessee vs. Astor, 2 How. 319, 340, the court says:

“The granting the license to sell is an adjudication upon all the facts necessary to give jurisdiction, and whether they existed or not is wholly immaterial, if no appeal is taken; the rule is the same whether the law gives an appeal or not; if none is given from the final decree, it is conclusive on all whom it concerns. The record is absolute verity, to contradict which there can be no averment or evidence; the court having power to make the decree, it can be impeached only by fraud in the party who obtains it. 6 Pet. 729. A purchaser under it is not bound to look beyond the decree; if there is error in it, of the most palpable kind, if the court, which rendered it, have, in the exercise of jurisdiction, disregarded, misconstrued, or disobeyed the plain provisions of the law which gave them the power to hear and determine the case before them, the title of a purchaser is as much protected as if the adjudication would stand the test of a writ of error; so where an appeal is given but not taken in the time prescribed by law. These principles are settled as to all courts of record which have an original general jurisdiction over any particular subjects; they are not courts of special or limited jurisdiction,

they are not inferior courts, in the technical sense of the term, because an appeal lies from their decisions. That applies to "courts of special and limited jurisdiction, which are created on such principles that their judgments, taken alone, are entirely disregarded, and the proceedings must show their jurisdiction;" that of the courts of the United States is limited and special, and their proceedings are reversible on error, but are not nullities, which may be entirely disregarded. 3 Pet. 205."

In the case of *Cornett vs. William*, 20 Wall 226, 240, the court said:

"The settled rule of law is that jurisdiction having attached in the original case everything done within the power of that jurisdiction, when collaterally questioned, is to be held conclusive of the rights of the parties, unless impeached for fraud. Every intendment is made to support the proceedings. It is regarded as if it were regular in all things and irreversible for error. In the absence of fraud no question can be collaterally entertained as to anything lying within the jurisdictional sphere of the original case. Infinite confusion and mischief would ensue if the rule were otherwise. These remarks apply to the order of sale here in question. The county court had the power to make it and did make it. It is presumed to have been properly made, and the question of propriety was not open to examination upon the trial in the Circuit Court. These propositions are sustained by a long and unbroken line of adjudications in this court. The last one was the case of *McNitt v. Turner*."

Counsel for appellee, in the lower court, made the point that no notice was given that John M. Smith would apply to the court for permission to borrow the guardianship funds or that on a certain day his final account, as guardian of appellee, would come before the court for its approval.

The question as to the necessity of giving notice in probate proceedings and the effect of want of notice has repeatedly been before the Supreme Court of the United States. In the case of *Simmons vs. Saul*, 138 U. S., 439, 453, the court, in considering an objection made to an order of sale on the ground that notice of sale was not given, said:

“But even if it be conceded that the requirements referred to do apply, we are of the opinion that, the jurisdiction over the subject matter having attached, any informalities as to notices, advertisements, etc., in the subsequent proceedings of the court, cannot oust that jurisdiction. They are, at most, errors which could be corrected on appeal, or avoided in a direct action of annulment, as expressly provided in the articles of the code above cited, but cannot be made the grounds on which the decree of the court can be collaterally assailed.

“Our conclusion on this branch of the case is fully borne out by many decisions of the court, two of which are cited above. In *McNitt v. Turner*, 16 Wall. 366, Mr. Justice Swayne, speaking for the court, said: ‘Jurisdiction is authority to hear and determine. It is an axiomatic proposition that when jurisdiction has attached, what-

ever errors may subsequently occur in its exercise, the proceedings being *coram judice*, can be impeached collaterally only for fraud. In all other respects it is as conclusive as if it were irreversible in a proceeding for error.' Grignon's Lessee v. Astor, 2 How. 319, 337, 340, 341 was, like this, a case of a sale by an administrator. The court, in its opinion, said: 'The whole merits of the controversy depend on one single question: had the county court of Brown County jurisdiction of the subject on which they acted? . . . Nor is it necessary that a full or perfect account should appear in the records of the contents of papers on file, or the judgment of the court on matters preliminary to a final order; it is enough that there be something of record which shows the subject matter before the court, and their action upon it, that their judicial power arose and was exercised by a definitive order, sentence or decree.

. . . The granting the license to sell is an adjudication upon all the facts necessary to give jurisdiction, and whether they existed or not is wholly immaterial, if no appeal is taken; the rule is the same whether the law gives an appeal or not; if none is given from the final decree, it is conclusive on all whom it concerns. . . . The court having power to make the decree, it can be impeached only by fraud in the party who obtains it. 6 Pet. 729. A purchaser under it is not bound to look beyond the decree; if there is error in it, of the most palpable kind, if the court which rendered it have, in the exercise of jurisdiction, disregarded, misconstrued or disobeyed the plain provisions of the law which gave them the power to hear and determine the case before

them, the title of a purchaser is as much protected as if the adjudication would stand the test of a writ of error.' The following authorities are strong in support of the general proposition under consideration; *Thompson v. Tolmie*, 2 Pet. 157; *Mohr v. Manierre*, 101 U. S. 417; *Comstock v. Crawford*, *supra*; *Florentine v. Barton*, 2 Wall. 210; *Thaw v. Ritchie*, 136 U. S. 519."

Brown, in his work on jurisdiction, Second Ed. Sec. 141, page 476, speaking of the notice of sale says:

"The notice, when required, is not a jurisdictional one, nor are the proceedings adversary except in the sense that the statute gives the right to or prescribes the rule for such notice; and in the view of the writer the view laid down by the Supreme Court in *Grignon's Lessee v. Astor*, 2 How. 338 and constantly adhered to by that high court is correct in principle."

In *Elder vs. Mining Company*, 7 C. C. A. 354, the court of appeals for the Eighth Circuit said:

"The court had jurisdiction of the parties and the subject matter and it had the power and it was its duty to hear and decide every question of fact and law that arose in the progress of the case, until it was finally disposed of. It was its duty to inquire and decide whether the requirements of the practice act, in the particular mentioned, had been observed. The presumption is that it did so inquire, and that it decided the question rightly, and this presumption is of conclusive force as against a collateral attack upon the judgment. But if this, or any other question of law or fact which arose in the progress of the case,

was erroneously decided, the jurisdiction of the court, and the validity of its judgment would not be affected thereby. An erroneous decision does not divest a court of its jurisdiction over the case. *Elliott v. Piersol*, 1 Pet. 328, 340. If it commits errors, they can only be corrected by appropriate appellate procedure in a court which, by law, can review the decision. *Bronson v. Schulten*, 104 U. S. 410. But neither this court nor the circuit court is invested with appellate or supervisory jurisdiction over the state courts, nor can either reverse, vacate, or modify their judgments, in cases in which they had jurisdiction of the parties and the subject matter. *Tendall v. Howard*, 2 Black, 585; *Nougue v. Clapp*, 101 U. S. 551; *Central Trust Co. v. St. Louis, A. & T. Ry. Co.* 40 Fed. Rep. 426. The judgment of June 10, 1882, even if it were erroneous, was not void, and has the same force and effect as if no error had been committed in its rendition."

See also:

- Vorhees vs. Bank*, 10 Pet. 478;
- Manson v. Duncansen*, 166 U. S. 547;
- U. S. v. Morse*, 218 U. S. 508;
- Cohen v. Portland Lodge*, 152 Fed. 369;
- Burton v. Kipp*, 30 Mont. 275.

Counsel for appellee, in the course of their argument in the lower court, attacking the validity of the order of December 11, 1900, set out § 7795 of the Revised Codes of Montana empowering the court to order the investment of the funds of the ward. Counsel for respondent, in *Smith v. Smith*, *supra*, set out

the same statute on pages 106-7 of their brief, and contended that under it the court had authority to make the order complained of. The court in that case must have reached the same conclusion in rendering its decision, as heretofore pointed out.

See *In re Schandony's Estate* (Cal.), 65 Pac. 877, which case is followed and approved in:

Johnson v. Canty (Cal.), 123 Pac. 263, 265;

Hughes v. Goodale, 26 Mont. 93;

Final Account of John M. Smith in the matter of the Estate and Guardianship of William Smith, minor, Filed Dec. 1, 1906, Recorded in Sales Accts. & Ex. 19 pp. 47-53; *Rec. Smith v. Smith*, pp. 1333, 1346.

VI.

THE ORDERS SETTTLING THE FINAL ACCOUNT OF AND DISCHARGING THE GUARDIAN.

In paragraph IV of the answer the approval and settling of the account of appellant's testator as guardian of the appellee, December 14, 1906, and his discharge, December 27, 1906, are alleged, and certified copies of these orders or judgments of the state District Court were put in evidence. What is the effect of the same? That the state District Court had jurisdiction of the subject matter cannot be questioned.

Nor can its jurisdiction to render the orders in question, for the rule is, that in a collateral attack upon a judgment, and the present is such an attack:

“A judgment which is merely voidable is not open to collateral attack.

“A judgment of the district court, having jurisdiction of the subject matter of the action, *unless void on its face or an inspection of the judgment roll, is not open to collateral attack.*

“When a direct attack, other than by appeal, is made upon the judgment of a domestic court of general jurisdiction, the presumption that jurisdiction was had of the defendant obtains, *unless the record affirmatively shows the contrary, or that the defendant was at the time of the service without the territorial limits of the court's jurisdiction.*” *Burke v. Interstate, etc.,*

Ass'n, 25 Mont. 315.

And see also

In re McNeil's Estate, 155 Cal. 333, 100 Pac. 1086.

Such orders are explicitly made appealable in 60 days after rendition. Revised Codes of Montana, Secs. 7098, Sub. 3 and 7099, and if not appealed from, they become conclusive. Revised Codes, § 7649, which by the provisions of Revised Codes, § 7792, is made applicable to the settlement of guardians' accounts. Direct authority for this statement is found in *re Dougherty's Estate*, 34 Mont. 334, 344; in *re Williams' Estate*, 146 Cal. 195, 79 Pac. 879.

“A judgment or order of court having jurisdiction is conclusive of all matters involved which might have been disputed at the hearing, although no objection was in fact made. This rule applies to the settling of accounts, the same as to any other proceeding. Estate of Grant, 131 Cal. 426, 63 Pac. 731; Estate of Bell, 142 Cal. 102, 75 Pac. 679.”

And, as is said in *Newberry v. Wilkinson* (9 C. C. A.), 199 Fed. 680:

“The federal courts being governed and controlled by the local laws respecting the administration of estates, their jurisdiction, in so far as it is exercised, is necessarily concurrent with the probate jurisdiction of the several states; and, being concurrent, it follows that the orders and judgments of such probate courts in the due and orderly administration of such estates are conclusive and binding upon the federal courts. This latter deduction has been observed to be the case in the matter of the succession of estates. *Johnson v. Waters*, 111 U. S. 640, 667, 4 Sup. Ct. 619, 28 L. Ed. 547.”

In *Botkin v. Kleinschmidt*, 21 Mont. 1, the defense was sought to be made by sureties on a guardian's bond, the district court having settled the guardian's account, that in such settlement the court had awarded too much interest, but the court said:

“It is also claimed by appellants that judgment was rendered against Yaeger for too much interest by the District Court. This matter cannot be inquired into now. The judgment of the District Court is conclusive in this action. If the

judgment was rendered for too great a sum, the parties aggrieved should have sought their remedy in the District Court, and, failing there, should have appealed. No remedy is obtainable in this collateral action."

In the instant case the contention is that too little interest was allowed; that he used the funds for his own use, etc. But, surely in this no fraud can be said to have been practiced. A full statement, as the account shows, was rendered; the borrowing of the money by the guardian at three per cent interest was by reason of the order of court of December 11, 1900; the validity of this order was directly drawn in question in the suit in the state court between the present parties, See *Smith v. Smith*, 45 Mont. 564, and was considered in the course of the opinion in that case, see 45 Mont. on pages 573, 580, 581, on which latter page the court says:

"It is claimed that this may be done because the whole course of action was fraudulent and therefore void; that the subsequent use of his money, pursuant to a prior design to so employ it, vitiated the sale theretofore made. But his premises are defective. Not any fraud in fact was contemplated or practiced in any part of the proceedings; at most a mistake was made by the guardian as to his right to so use the money."

And even if it be contended that the order discharging the guardian was prematurely entered under Revised Codes § 3794, still the district court had jurisdiction, and its judgment or order was merely erro-

neous, an error within jurisdiction, correctible either by motion in that court or by direct appeal, and not void, and a bill in equity will not lie to set it aside.

White v. Crow, 110 U. S. 183, 188;

1 Black on Judgments, § 85;

Mitchell v. Aten, 14 Pac. 498;

In re Newman's Estate, 75 Cal. 213; 16 Pac. 889.

Fraud is easily, and frequently rashly asserted, hence it is that it is an unvarying rule that to establish fraud there must be appropriate allegations in the pleadings, and clear and convincing proof to sustain them. We do not dispute that judgments of a court may be impeached for fraud in direct proceedings brought for that purpose, but

“If the proceeding contemplates more than the setting aside of its final settlement, and the further remedy is sought in the chancery court (as is here the case), all persons having an interest in the estate must be made parties; but if the sole object is to set aside the final settlement, the proceeding should be against the administrator alone.”

2 Woerner on Administration, p. 1133, § 508.

To say, in the light of the record in the state court in the present case, and of the decision of the state supreme court affirming it, that any of the orders here referred to were obtained fraudulently, is about as rash a generalization as might be imagined.

Nor is it true, we submit, that the bond given by

John M. Smith as guardian would not cover the money borrowed in the event of a loss thereof.

Section 7760 of the Revised Codes of Montana says that a person appointed guardian must give a bond before his appointment as guardian takes effect and sets out certain conditions "which shall form a part of said bond without being expressed therein," and these conditions are broad enough to cover the moneys borrowed.

VII.

ELECTION OF REMEDIES.

The action brought by the appellee in the state court was to set aside the sale and for an accounting of all the moneys which came into the hands of John M. Smith under it. In other words, the appellee had two remedies available to him, either to affirm the sale and demand judgment for his share of the proceeds thereof, or to set aside the sale and demand his share of the stock of the estate of William A. Smith and all the dividends paid thereon, and the profits flowing therefrom which came into the hands of John M. Smith. Appellee chose the latter remedy and brought his action in the state court, alleging that the sale was fraudulent, and demanded both general and specific relief in the event that the court should set aside the sale.

Appellant contends that having elected to set

aside the sale, appellee cannot now bring this action for relief, based on that ground.

An examination of the records of this court on the accounting had betewen Nellie Mae Moore, as complainant, and the present defendant, as defendant, will show that under the interlocutory decree of this court on said accounting and under the report of the master, made in pursuance thereof, complainant, Nellie Mae More, was awarded interest at eight per cent. on her share of the moneys, the proceeds of said sale which passed into the hands of her guardian, John M. Smith. Appellee was defeated in his action in the state court upon identically the same theory upon which said Nellie Mae Moore recovered, wherein if successful, he would have been awarded the same rights. After having been defeated he brings a new action upon an opposite theory and asks that he may be awarded interest at the same rate upon his share of the moneys of said sale which passed into the hands of his guardian, John M. Smith. It is clear to us that if interest upon these moneys would have been awarded him, in the event that the District Court of Meagher county had held the sale void for fraud, that he is not entitled, in this action, to interest upon the same moneys after the sale has been held to be valid and in all respects free from fraud.

Counsel for appellee seeks to limit this action to one which has for its purpose the setting aside of the

final account between him and John M. Smith, as guardian.

In their petition for rehearing in Smith against Smith, *supra*, said counsel say:

“One of the purposes of the action was to annul the settlement made with appellant and to have the sale adjudged void because of the circumstances and conditions under which the stock was bought and paid for. . . .” That “the further appropriate redress is an accounting for the purchase money and interest from the time the guardian used it; that his use of it entitled the appellant not to overturn the sale but to have interest at a proper rate and for the full period of its use.”

If the action brought by him in the state court entitled appellee to this relief, then when judgment went against him, having made his election of remedies, he could not bring the present action and seek therein the same relief.

“Election is simply what its name imports; a choice, shown by an overt act, between two inconsistent rights, either of which may be asserted at the will of the chooser alone. Thus, ‘if a man maketh a lease, rendering a rent or a robe, the lessee shall have the election.’ Co. Litt. 145a. So a man may ratify or repudiate an unauthorized act done in his name. *Metcalf v. Williams*, 144 Mass. 452, 454, 11 N. E. 700. He may take the goods or the price when he has been induced by fraud to sell. *Dickson v. Patterson*, 160 U. S. 584. He may keep in force or

may avoid a contract after the breach of a condition in his favor. *Oakes v. Ins. Co.* 135 Mass. 248, 249. In all such cases the characteristic fact is that one party has a choice independent of the assent of any one else."

Bierce vs. Hutchins, 205 U. S. 346.

In the case of *Robb v. Vos*, 155 U. S. 13, the court, in considering the question of election of remedies, says:

"We do not deem it necessary to review numerous cases, involving questions of election of remedy and ratification, cited on behalf of the respective parties, but shall content ourselves with referring to two or three that satisfactorily illustrate the principles upon which we proceed."

In *Conrow v. Little*, 115 N. Y. 387, 393, 394, the court said:

"The contract between Branscom and the plaintiff was, upon the discovery of Branscom's fraud, voidable at their election. As to him, the plaintiffs could affirm or rescind it. They could not do both, and there must be a time when their election should be considered final. We think that time was when they commenced an action for the sum due under the contract, and in the course of its prosecution applied for and obtained an attachment against the property of Branscom as their debtor. They then knew of the fraud practised by him, and disclosed that knowledge in the affidavit on which the attachment was granted, and became entitled to that remedy because it was made to appear that a cause of action existed in their favor by reason of 'a breach of

contract to pay for goods and money loaned obtained by fraud.' The attachment was levied and the action pending when the present action, which repudiates the contract and has no support except on the theory of its disaffirmance, was commenced. The two remedies are inconsistent. By one, the whole estate of the debtor is pursued in a summary manner, and payment of a debt sought to be enforced by execution; by the other, specific articles are demanded as the property of the plaintiff. One is to recover damages in respect of the breach of the contract, the other can be maintained only by showing that there was no contract. After choosing between these modes of proceeding, the plaintiffs no longer had an option. By bringing the first action, after knowledge of the fraud practised by Branscom, the plaintiffs waived the right to disaffirm the contract, and the defendants may justly hold them to their election.' The principle applied in *Foundry Company v. Hersee*, 103 N. Y. 26, and *Hays v. Midas*, 104 N. Y. 602, requires this construction, for the present contains the element lacking in those cases, viz., knowledge of the fraud practised by the vendee; and by reason of it the plaintiffs were put to their election.

"It is not at all material to the question that the plaintiffs discontinued the first suit before bringing the present to trial, for it is the fact that the plaintiffs elected this remedy, and acted affirmatively upon that election, that determines the present issue. Taking any steps to enforce the contract was a conclusive election not to rescind it on account of any thing known at the time. After that the option no longer existed,

and it is of no consequence whether or not the plaintiffs made their choice effective.”

In *Connihan v. Thompson*, 111 Mass. 270, 272, the court said:

“The defence of waiver by election arises where the remedies are inconsistent; as where one action is founded on an affirmation and the other upon the disaffirmance of a voidable contract or sale of property. In such cases, any decisive act of affirmation or disaffirmance, if done with knowledge of the facts, determines the legal rights of the parties, once for all. The institution of a suit is such a decisive act; and if its maintenance necessarily involves an election to affirm or disaffirm a voidable contract or sale, or to rescind one, it is generally held to be a conclusive waiver of inconsistent rights, and thus to defeat any action subsequently brought thereon.”

“The rule established by these cases is that any decisive act by a party, with knowledge of his rights and of the facts, determines his election in the case of inconsistent remedies, and that one of the most unequivocal methods of showing ratification of an agent’s act is the bringing of an action based upon such an act.”

See also:

- Moller v. Tuska*, 87 N. Y. 166;
- Acer v. Hotchkiss*, 97 N. Y. 395;
- Stevens v. Pierce*, 151 Mass. 207;
- Kinney v. Kiernan*, 49 N. Y. 164;
- Thompson v. Howard*, 31 Mich. 309;
- Farwell v. Myers*, 59 Mich. 179;
- Thomas v. Sugerman*, 157 Fed. 669;
- Terry v. Munger*, 121 N. Y. 161.

VIII.

THE DECREE.

The decree, now appealed from (Transcript, p. 194), adjudges that complainant (appellee) "have and recover from the estate of John M. Smith, deceased, and from Mary M. Smith, as executrix of the estate of John M. Smith, deceased, defendant, the sum of * * * * * \$24721.24" with costs, and interest. In the 15th subdivision of the assignment of errors (Transcript, 200) and in this brief, *supra*, this decree is assailed as not being in accordance with the statutes of Montana. This instant case is one in which those statutes are invoked, and sought to be enforced, for the purpose of having appellee's claim allowed as a claim against appellant's estate, for it is alleged in the bill of complaint (Transcript, p. 15) that the claim was presented to the executrix for allowance or rejection; that because of non action thereon for ten days complainant, appellee, elected to consider the same rejected (Revised Codes, § 7528); and that within three months thereafter the present action was begun (As Rev. Codes, § 7530 prescribes). Doubtless jurisdiction exists in the Federal courts in that regard, but only to the extent and in the manner that the state courts could exercise such jurisdiction, for on this precise point this court has said in *Newberry v. Wilkinson* (9 C. C. A.), 199 Fed. 679:

"Equity jurisdiction in the federal courts, however, may yet be said to extend to the admin-

istration of the estates of deceased persons sub modo—that is, where it concerns citizens and residents of different states; but it is an inexorable rule that, in the exercise of such jurisdiction, such courts will be governed and controlled by the statutory rules and regulations of the states pertaining to the administration and the settlement of such estates. *Security Trust Co. v. Black River National Bank*, 187 U. S. 211, 23 Sup. Ct. 52, 47 L. Ed. 147. In short, the federal equity courts, when occasion requires, for the protection of proper parties concerned, will administer the local probate procedure, but in obedience to the local law governing the same.”

With this rule in mind it becomes necessary to ascertain what the state statutes and the decisions of the state Supreme Court construing the same are. When a claim is rejected, under the provisions of Rev. Codes, § 7530, the holder must bring suit in the proper court within three months thereafter, otherwise the claim shall be forever barred. The only kind of judgment which the court can render in such an action is that prescribed by Revised Codes, § 7536, which reads:

“A judgment rendered against an executor or administrator, upon any claim for money against the estate of his testator or intestate, only establishes the claim in the same manner as if it had been allowed by the executor or administrator and a judge; and the judgment must be that the executor or administrator pay, in due course of administration, the amount ascertained to be due. A certified transcript of the docket of the

judgment must be filed among the papers of the estate in court. No execution must issue upon such judgment, nor shall it create any lien upon the property of the estate, or give to the judgment creditor any priority of payment."

This statute has been construed by the Supreme Court of Montana; thus in *Gauss v. Trump*, 48 Mont. 92, 135 Pac. 910, wherein was attacked a judgment in the precise form of the one at bar, the court said, page 101:

"The form of the judgment is assailed, and rightly so. It provides that the plaintiff 'have and recover' from the defendant, as administratrix, the amount of the verdict and costs, whereas, it should simply have adjudged that the defendant, as administratrix, pay in due course of administration the amount ascertained to be due."

And this, too, has been the ruling of the California Supreme Court from which state our statute was taken.

See *Vance v. Smith*, 124 Cal. 219, 56 Pac. 1031.

Moore v. Russell, 133 Cal., 297, 65 Pac. 624.

Clearly, then, even if the decree appealed from be affirmed, it should be so only to the extent that the claim involved herein be established as provided for by said Revised Codes, § 7536.

But we submit that the decree should be reversed and not modified. All of which is respectfully submitted.

R. LEE WORD,

H. G. & S. H. McINTIRE,

Solicitors and of Counsel for Appellant.

NO. 2448

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

MARY M. SMITH, as EXECUTRIX,

Appellant.

vs.

WILLIAM SMITH,

Appellee.

BRIEF OF APPELLEE.

T. J. WALSH,
C. B. NOLAN,
WM. SCALLON,
T. J. HOOLAN,

Of Counsel for Appellee.

Filed

OCT 27 1914

F. D. MacFarland

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BRIEF OF APPELLEE.

I.

The Court had jurisdiction to re-open and correct the account of the Guardian upon the facts and circumstances of this case. This was a proper case for the exercise of the power and the power was properly exercised.

Griffith v. Godey, 113 U. S. 89. (A case from California).

This was cited at the hearing.

Van Bokkelen v. Cook, 28 Fed. Cases, page 949.
Case No. 16831. (A Nevada case heard before
Judges Field, Sawyer and Hillyer.)

Froebrich v. Lane, 45 Ore. 13; 76 Pac. 351.

106 American State Reports, 634;

Silva v. Santos, 71 Pac. 703;

Lataillade v. Orena, 27 Pac. 924.

Clyce v. Anderson, 49 Mo. 37; (This case has
been cited with approval in Howard v. Scott,
225 Mo. 714; Mayold v. Bacon, 229 Mo. 487).

Scoville v. Brock, 79 Vt. 449, 65 Atl. 577, 118
Am. St. Reports, 975 and note.
Story's Equity Jurisprudence, Sec. 187; (13th Ed.)
State v. Peckham, 36 N. E. 28;
Euler v. Euler (Ind.), 102 N. E. 856;
Ridenbaugh v. Burnes, 14 Fed. 93.

The jurisdiction of the United States Courts over accounts and other matters involved in probate proceedings is considered and stated also in

Payne v. Hook, 7 Wall. 425.

The alleged order of discharge, put in evidence by the defendant, offers no impediment to the granting of the relief prayed for, even assuming the validity of this order. In many, if not most, of the cases of this nature which have been before the courts, there had been discharges of executors or administrators, as well as the settlement of final accounts. In

Griffith v. Godey, *supra*,

there does not seem to be any express reference to a discharge, but the case was decided so long after the settlement of the account of the administrator, that the usual order of discharge must have been entered. It appears from the report that the accounts were approved in 1872, and it was twelve years afterwards that the case was reached in the Supreme Court. In

Van Bokkelen v. Cook, *supra*,

it was alleged in the bill of complaint that a discharge had been granted, yet, the bill was sustained. In

Lataillade v. Orena, *supra*,
Silva v. Santos, *supra*,
Euler v. Euler, *supra*,
Ridenbaugh v. Burnes, *supra*,

it also appears that the Guardian had obtained his final discharge.

The liabilities of a guardian for use of ward's funds was recently considered by the Supreme Court of Montana. *In re Allard* 141, Pac. 661 (Ad. Sheet No. 5), and the old time rules applied.

The order of final discharge does not add anything to the decree of settlement of the final account. It is issued in pursuance of the final account.

Instead of protecting the guardian against an attack on his accounts, the obtaining of such an order, before the expiration of the year following the date of the majority of the minor, is an additional dereliction and an additional violation of duty. For a guardian to attempt to steal a march on his ward, by obtaining a discharge ahead of time is an act of fraud. The fiduciary relations and the obligation of perfect good faith, on the part of the guardian do not cease on the day of the majority of the ward. They continue during the time of settlement of accounts and for some time after the ward's majority.

Authorities cited above and

Pomeroy Eq., Sec. 961, and note 3 of Third Edition.

To obtain a discharge in violation of the law is an act of bad faith, and, in order to obtain such a discharge, the judge who signed it must have been imposed upon. He must have signed it inadvertently. If he had been made aware of the fact that the order was premature, he would not have signed it.

No excuse was proved at the trial, and no evidence was offered by the defendant to explain the procuring of this order. If anything, this fact should weaken the defense. We are not dealing here with a matter or a case conducted between adver-

saries who are dealing with each other at arms' length. The parties concerned here, viz., the guardian and the ward had sustained, and still sustained, fiduciary relations.

Indeed, if we look at the wording of the order itself, we shall see that it can have no possible effect upon this case, even if it be considered valid and regular. It is the settlement of the account that is the important order, and not the discharge.

With the exception of the title, the order is as follows:

"It appearing that said estate and guardianship has been fully administered, and it being shown by the guardian thereof, by the production of satisfactory vouchers, that said guardian has paid all sums of money due from him, and delivered up under the order of the Court all the property of the estate to the party entitled and performed all acts lawfully required of him.

"It is ordered, adjudged and decreed, that said guardian, John M. Smith, and his sureties be and they are hereby released and discharged from all liability to be hereafter incurred; that said estate is fully distributed, and the trust settled and closed.

"Dated this 27th day of December, 1906.

"E. K. CHEADLE,

"Judge of the District Court."

The order was, presumably, intended to conform to Section 7696 of the Revised Codes, which reads as follows:

"7696. FINAL SETTLEMENT, DECREE, DISCHARGE.—When the estate has been fully administered, and it is shown by the executor or administrator, by the production of satisfactory vouchers, that he has paid all sums of money due from him, and delivered up, under the order of the court or judge, all the property of the estate to the parties entitled, and performed all the acts lawfully required of him, the court or judge must make an order discharging him from all liability to be incurred thereafter."

though it goes somewhat beyond that section in declaring "the trust settled and closed," and in referring to the sureties.

But take it as it is, the order releases the guardian and his sureties from all liability to be *thereafter incurred*. In that, it conforms to the wording of the statute. That has nothing to do with any past liability. The effect of the order is to relieve the guardian, executor or administrator from his office and from further responsibility. After the entry of the order, he can, no longer, act officially. When valid, such an order, unless duly set aside or reversed, would, presumably, put an end to the jurisdiction of the probate court over the guardian, executor or administrator; but, as we have said, there is nothing in the order itself that otherwise affects the rights of the parties. The recital that the guardian has paid all sums of money due from him, can only mean that he has paid all sums of money shown to be due by the accounts settled. The order is made *ex parte* "upon the production of satisfactory vouchers." There was no hearing of any other party. No notice seems to be required; the matter is entirely *ex parte*. This order is, evidently, based on the vouchers produced. No notice was given. (Tr. p. 61.) If such an order were intended or purported to divest the heirs, wards or other persons in interest from rights of actions against the guardian or representative, if it purported or intended to deprive them of the right to re-open the accounts in equity, it would be void and in violation of the Constitution of the United States and the Constitution of the State of Montana, because it would be an attempt to deprive persons of their rights without due process of law. The right of the administrator or guardian to be released from further responsibility is one thing. It may be conceded that that may be accomplished in the manner provided

by the statute, but to deprive a party in interest of a right of action against the guardian or administrator for past doings, would be to deprive the latter of a valuable property-right, and to do so without any hearing, or any notice to him, would violate elementary and fundamental constitutional principles.

We, therefore, submit that the order, even if valid, would not affect the complainant's right here. The only result of the proof of the existence of this order is to show a discrepancy in the complaint. But the discrepancy is not serious, inasmuch as it relates to a matter which is not material. It would be merely a matter of formal amendment,—if any amendment were necessary—and on appeal it would be deemed to have been made. Even if the discharge were not void, it would not be a defense.

The alleged discharge of December 27th, 1906, is void.

We go further regarding this order, and respectfully insist that, insofar as it purports to be an order of discharge, it is void. Under Section 351 of the Civil Code "A guardian appointed by a court is not entitled to his discharge until one year after the ward's majority."

It was the practice in equity, in the absence of any statute, to allow an infant one year after his majority to investigate the accounts of his guardian and to surcharge or falsify the same, if they were found to be wrong, and, under that rule, the guardian's bond was not to be delivered up until the expiration of the year.

In Re Van Horne, 7 Paige, 46;
Same case, N. Y. Chancery Rep. Lawyers' Ed.
Vol. 4, p. 54.

The question of the validity of an order of discharge of a guardian prematurely made does not seem to have been passed upon in California. At least, we have not found any case in which that question was directly passed upon; but in the case of

Cook v. Ceas, 77 Pac. 65,

we find on page 68 a reference to the corresponding section of the California Civil Code.

The Court, after stating that a decree of discharge, such as is provided for in the case of an administrator or executor, can also be obtained by a guardian, and speaking of such a decree, it says:

“And this evidently is the discharge which the court is prohibited from granting until one year after the ward’s majority. Civ. Code §257. A guardian may settle with his ward the day after he comes of age, and obtain his release, but he cannot have a decree of court confirming the settlement and release until the ward has had a year to consider whether he will affirm or repudiate it. Id. §256.”

The Civil Code has established a positive rule. The probate court is not authorized to violate it.

In Re Tuohy’s Estate, 33 Mont. 230,
it is said on page 244:

“It is well settled by the decisions of this court, that the district court sitting as a court of probate has only such powers as are expressly conferred upon it by statute, and such as are necessarily implied in order to carry out those expressly conferred, *and that in the exercise of its jurisdiction it is limited by the provisions of the statute.*”
(Italics ours).

To the same effect

State Ex Rel Shields vs. District Court, 24 Mont.
1, and the cases there cited.

In State v. District Court, *supra*,

it is said on page 13, with regard to the powers of the court:

“Its power when sitting in probate matters is derived from the statute, and it cannot go beyond the provisions of the statute.”

In *Smith v. Westerfield* (Cal.), 26 Pac. 207,

it is said:

“Proceedings for the administration of the estates of deceased persons and for their distribution to those who may be entitled thereto, including the determination of the heirs of the decedent, are purely statutory. The superior court, while sitting as a court of probate, has only such powers as are given it by statute, and such incidental powers as pertain to all courts for the purpose of enabling them to exercise the jurisdiction which is conferred upon them. Although it is a court of general jurisdiction, yet in the exercise of these powers its jurisdiction is limited and special; and whenever its acts are shown to have been in excess of the power conferred upon it, or without the limits of this special jurisdiction, such acts are nugatory, and have no binding effect, even upon those who have invoked its authority, or submitted to its decision. The authority conferred upon the superior court by the above section to determine the heirship of claimants to an estate is a ‘special proceeding,’ within the meaning of that term as defined in the Code of Civil Procedure. Section 22, *Id.*, declares that ‘an action is an ordinary proceeding in a court of justice by which one party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or punishment of a public offense;’ and section 23 of the same Code declares that ‘every other remedy is a special proceeding.’ Jurisdiction of special proceedings is conferred by the constitution upon the superior court; but, inasmuch as special proceedings are only such as are created and authorized by statute, the court, in the exercise of this jurisdiction, is limited by the terms and conditions under which the proceedings were authorized.”

Freeman, in his work on Judgments, says, Section 319b, last paragraph:

“The validity of orders and decrees made by courts

exercising jurisdiction over the estates of decedents, minors, and incompetent persons is, however, as in all other cases, dependent on their having jurisdiction over the persons and subject-matters affected thereby, and whenever the statute requires a particular notice to be given, and the omission to give it is conceded, the order or decree based thereon must be treated as void. In truth, matters are regarded as jurisdictional in the probate, surrogate, and orphan's courts which are not so regarded in other courts. Thus a court ordering a sale of property is, according to the majority of the authorities, without jurisdiction to do so if the petition therefor was not presented by a person having authority to present it, or was not sufficient in substance to support the order sought, or did not substantially contain a statement of all the matters required by statute to be stated therein."

Under the Civil Code no power exists in the court sitting in probate to grant a discharge to a guardian until after one year. That is, really, now a rule of substantive law. The rule invoked by counsel for defendant, applicable to the premature entry of a judgment in actions, cannot apply. In the case of actions there has been a notice; the proceedings are adversary; the jurisdiction of the court attaches, and its powers are set in motion when the action is commenced. An action is a proceeding conducted according to the rules of the common law or of equity. These probate proceedings are special statutory proceedings, and, as declared by the Supreme Court of Montana, the court has no power except such as is conferred by statute.

II.

The decision of the State Court in *Smith v. Smith* is not *res judicata*.

This clearly appears from the decision itself. The decision

of the Supreme Court is reported in 45 Mont. 535. On page 579 near the foot of the page, the decision says:

“It may be that upon the settlement of the guardian’s accounts he should have been required to pay a greater rate of interest and for a longer period of time, than was actually required of him, but that question is not before us;” etc.

Here, we have the express declaration of the court, that the matter of the interest was not before it. In the petition for re-hearing, the appellant again urged upon the court that he should be allowed interest, but counsel for respondent resisted, as shown by their brief in reply to the petition for re-hearing. The petition for re-hearing was denied, without any comment, and it, necessarily, follows that the court decided to stand by the decision as already made, and tacitly affirmed it.

Under the very wording of that decision, the matter of interest was not before the court, and, so, that decision leaves the matter open. There is nothing in the findings of the court below in that case which concludes the matter of interest. If there had been, the matter would have been before the Supreme Court, but we have seen that that court declared that the matter was not before it. The conclusions of the court below dealt with the sale.

This suit is not based upon the same cause of action as was before the State Court in *Smith v. Smith*. It is based on a different cause of action. That was a suit to set aside the sale. This is a suit to open the guardian’s account, and to surcharge his accounts. Therefore, the rule laid down by the Supreme Court of the United States applies here, namely, in

Cromwell v. Sac County, 94 U. S. 351;
Davis v. Brown, 94 U. S. 423.

In *Cromwell v. Sac County*, the court said:

"But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action; not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

Under these decisions, it is clear that the decision in the State Court is not conclusive or applicable here. It is true that the complainant in this case, when before the State Supreme Court, sought to have the court allow him interest, and argued that under the prayer for general relief, the court had the power so to do, but it is also quite evident, from the decision, that the view thus urged did not find favor with the court, because it decided that the matter was not before it.

The contentions of the defendant in regard to the former adjudication are best answered by the language of the decision of the State Supreme Court which we have quoted above, and to which the appellant makes reference on page 60 of her brief, where the court positively says "that question is not before us."

In the face of that declaration, how can those who strenuously contended that the matter was not before the court and whose contentions were sustained, now insist that the matter was before the court! Counsel attempt to explain indirectly this change of attitude by suggesting that the statement of the

court was in effect an affirmance of the order of the District Court, approving the final account of John M. Smith as guardian of the complainant. The inconsistency as well as the futility of this contention of appellant is well illustrated by the excerpt from her counsel's brief in the state court in answer to the petition for a rehearing. (Trans. pp. 57-58.) In speaking of the claim for interest that brief says:

"The third ground urged in the Petition for Rehearing is utterly without merit. The question involved is not before the court on this appeal. The matter was disposed of by this Court in the following language:

"It may be that upon the settlement of the guardian's accounts he should have been required to pay a greater rate of interest and for a longer period of time than was actually required of him, but that question is not before us." And how, we ask, could it possibly be before the Court in the proceeding? The foundation of plaintiff's action was and is the claim that the sale of the stock in question was fraudulent and void and the purpose of the action was to disaffirm the sale. Utterly routed in their attempt to overturn the sale in question, counsel now ask the Court at this time to treat their cause of action, disaffirming the sale as one *affirming* the sale and to now grant appellant relief upon that theory."

We submit that there is nothing either in the decision itself, or in the issues presented, to justify such an assertion. The account of John M. Smith, or the order of the court approving this final account are not referred to at all in the pleadings. They were not in issue insofar as the sale was concerned. They could not be, consistently with the allegations of the plaintiff, and the cancellation of the sale of the stock. It is only upon the theory of a valid sale or upon the affirmance of the sale that a claim for interest could be presented. As already explained, the opening of the account was contended for

merely by William Smith under the general prayer, if cancellation were denied. The supposition indulged in by counsel that the state court intended to say that the order approving the final account was a final order, conclusive except on appeal, is gratuitous. It may be said that the state court has stated that there was no actual fraud in the conduct of John M. Smith, but even that is subject to qualification insofar as the order of December, 1906, is concerned, as will be shown in a subsequent subdivision of this brief.

On pages 59-60, the appellants' brief quotes from the opinion of the court the statements regarding John M. Smith's good faith. In the part quoted from page 578, the court was evidently referring to the original transaction; that is, to the sale. In the part on page 579, the court says that the sum of eighty-five thousand dollars "after deducting expenses of administration has been fully paid them." That cannot mean any more than that eighty-five thousand dollars have been paid to the children or expended on their account, which is true as a matter of fact. Then this is immediately followed in the opinion as well as on page 60 of the brief, by the statement, that upon the settlement of the guardian's accounts, "it may be that he should have been required to pay a greater rate of interest, and for a longer period of time," etc., thus qualifying what has been said about the payment of the eighty-five thousand dollars. That statement of the court qualifies what it said on page 580, quoted on page 61 of the brief, that, (speaking of the purchase price) "all of it was accounted for when he became of age, and turned over to him." The rest of the statement quoted evidently had to do with the purchase. Again on page 580,

the reference to the guardian and the words, "and who, had in fact, fully accounted for all moneys paid over to him," evidently means accounted for the original principal. There was no evidence in that case and there was no claim there, any more than there is here that John M. Smith, in accounting, charged himself, or was charged, with any interest for the use of moneys from June, 1899, to December, 1900. There was no such finding made by the court below. There is no statement to that effect in the opinion of the Supreme Court. Indeed, if there was, it would have to be looked upon as a mere slip regarding a matter of fact, and not a ruling, because it would not be a ruling upon anything before them, but merely a statement made argumentatively. As to all such statements, we submit that the fair, the real, and only correct view to take is that the court was referring to the principal sum received by the guardian from the executor, leaving out of account the matter of the charge as to interest. Again where at the end of the quotation on page 63, of the brief, the words, "transaction otherwise regular and legal, by which no one had suffered any injury," evidently referred to the sale.

III

The order allowing the guardian to borrow the money.

This order was obtained by fraud and imposition on the court. Moreover, it is void, but whether void or not, it is no obstacle to recovery. The Circuit Court of Appeals in the case of,

Moore v. Smith, 182 Fed. 540,

discusses this order on the last page of the opinion. It is there said:

“ * * * which order recited the false pretense that that guardian then made application to borrow the money of his wards which he had long before misappropriated to his own use, upon which sham and false statement the court undertook to make an order authorizing the guardian to borrow his wards' money at the rate of 3 per cent per annum.

We are of the opinion that the record shows that both the sale of the stock of the estate of the deceased William A. Smith and the subsequent misappropriation of the money of the minors by their guardian were parts and parcels of a scheme entered into by and between N. B. and John M. Smith and consummated as hereinbefore indicated, which was a fraud both upon the minors and the probate court,” etc.

The contention that the former decision is conclusive has already been answered.

Counsel quote from the briefs of appellant, in the former case, to show that they attacked the order of December 11th, 1900. Of course, they attacked it. It was a matter of aggravation, so to speak, in the main case, in so far as it was contended by the plaintiff that it tended to show the consummation of John M. Smith's purpose in getting himself appointed guardian. But in so far as it bears upon the question of the right to interest it was not discussed by the court.

Counsel contend as we understand them;

1. That there was no fraud, according to the holding of the Supreme Court.
2. That the matter of the regularity of the order cannot be inquired into, and
3. That the question of the validity must be deemed to

have been in the mind of the court in deciding adversely.

As to the first point, we refer to the decision of this court in *Moore v. Smith*.

The Supreme Court certainly didn't decide that the use by a guardian of his ward's money without leave is meritorious, or lawful. Whether done in good faith or otherwise, such an act is certainly illegal, and so the matter of fraud is not eliminated. Legal fraud remains; what is known in equity as constructive fraud. The Civil Code, section 5380, declares:

"Every violation of the provisions of the preceding sections of this article is a fraud against the beneficiary of the trust." This applies to trusts of all kinds.

Among the preceding sections is 5375, which prohibits a trustee from using or dealing with the trust property for his own benefit. Other Sections in point are:

"4979; CONSTRUCTIVE FRAUD, WHAT.—Constructive fraud consists:

1. In any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him; or,

2. In any such act or omission as the law especially declares to be fraudulent, without respect to actual fraud."

'5073. DECEIT, WHAT.—A deceit within the meaning of the last section, is either:

1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true.

2. The assertion as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true.

3. The suppression of a fact by one who is bound to disclose it or who gives information of other facts which are likely to mislead for want of communication of that fact; or

4. A promise, made without any intention of performing it."

"3787. RELATIONS CONFIDENTIAL.—The relation of a guardian and ward is confidential, and is subject to the provisions of the title on trusts."

"5374.—TRUSTEE'S OBLIGATION TO GOOD FAITH.—In all matters connected with his trust, a trustee is bound to act in the highest good faith toward his beneficiary, and may not obtain any advantage therein over the latter by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind."

It has been repeatedly held under this provision that bad faith or fraud in fact was not necessary.

Smith vs. Goethe, 82 Pac. 384,
Sukeforth vs. Lord, 25 Pac. 497.

may be cited as illustrations.

It will not be contended by counsel that these sections have been repealed or rendered null by any decision. A perusal of the decision itself will show that the Supreme Court did not say that there was any legality in the use of the money.

See also, *In Re Allard* (Mont.) 141 Pac. 661, already cited.

In so far as the validity of the sale is concerned, which is the matter that they had disposed of, the Supreme Court did not regard the matter of the use of the money as of any conse-

quence. Neither the Supreme Court nor the State District Court held that John M. Smith had not concealed facts when he obtained that order, or in connection with his prior use of the money. Neither did they find that he or any one on his behalf ever informed plaintiff of the use of the moneys. In truth this fact was only discovered when the officers of the Union Bank and Trust Company were examined in the Moore case, viz., in 1908.

There is a finding of the District Court which holds as follows:

“On or about January, 1899, John M. Smith, spoke with Judge Armsrong about using the guardianship moneys at four per cent.”

But that does not say that he had told Judge Armstrong that he had actually used it. There is a finding relative to the order of December 11, which reads as follows:

“On December 11th, 1900, the order allowing John M. Smith the guardian, to use the money in his hands at three per cent per annum was made and entered, and at the same time, Waterman withdrew his name as counsel for the guardian, and that of N. B. Smith was entered as attorney for him.”

That finds nothing more than that an order was made. We allege the order in our complaint, so there is nothing in that finding to conflict with our contentions. The Supreme Court incorporates in its opinion the statement made by the Court of Appeals in Moore vs. Smith preceding the statement with these words:

“As stated in the brief of counsel for the appellant, ‘the cause is before this court for determination on identically the same evidence on which it was heard in the

circuit court of appeals.' We therefore take the following statement of facts from the opinion in that case (see *Moore v. Smith*, 182 Fed. 540):"

So there can be no question of the correctness of the facts regarding the application to borrow so far as disclosed by the evidence, or as stated by the Circuit Court of Appeals.

Mere irregularities may not suffice, but if the notice was essential, the failure is fatal. There is no claim that any notice was given.

The bill alleges in paragraph IV (Trans. p. 5) "That no notice of the application for said order was given to anyone or in any manner." There is no denial of this in the Answer, and there is no allegation that any notice was given. Under Equity Rule 30, averments (other than of value or amount of damage) if not denied are deemed confessed.

Section 7795, above quoted provides that the court may authorize a guardian "after such notice to persons interested therein as the court or Judge shall direct," meaning to persons interested in the estate. Here, no notice at all was given. That appears not only from the recitals of the order itself and from the pleadings but, also from the certified copy of the entries in the register or record of probate proceedings, which we have put in evidence.

This book is kept in pursuance of the provisions of Section 3048 of the codes. This section provides:

"The Clerk of the district court in addition to the duties prescribed by the Code of Civil Procedure and the Penal Code, must,—

"6. Keep a book called, "Record of Probate Proceedings," which must contain all the orders and proceedings of the

district court sitting in probate matters, as prescribed in Part III, Title XI., of the Code of Civil Procedure, which index must be indexed in the name of the deceased person, the executor or administrator, the guardian or ward."

"10. Keep a book called a "Register of Probate and Guardianship Proceedings," in which must be entered the name of the estate, the register number, with a memorandum of every paper filed, order or proceeding had therein, with the date thereof, and the fees charged."

Any order directing notice to be given, of course would be noted in the register.

If any notice had been given or ordered given the defendant could easily have proved the fact.

No order to give notice; no proof of notice; no written application, and no application, previous to the time of the making of the order, appear to have been made.

Even if the absence of notice were not absolutely fatal, it would be a very important fact in connection with the impeachment of the order, on the ground of fraud, and in connection with the matter of fraud, we note again that counsel referred to the finding of the District Court to the effect that in January, 1899, John M. Smith had talked to Judge Armstrong about borrowing the moneys at four per cent per annum, and we submit that this makes his case worse. The concealment and suppression of the fact of his appropriation of the moneys was deliberate. If the judge had been apprised then that the moneys, instead of lying idle in the hands of the guardian, had actually been used by him, and used to pay off notes on which he was paying nine per cent interest, the judge would

not have been given the impression that it was difficult to invest these moneys and would not have been likely to allow the guardian to borrow them at three per cent.

The absence of notice is only one of the objections urged against this. **Lack of power to make the order is also asserted by us.**

We shall now consider that question:

The section of the statute which authorizes the investment of money of a ward is as follows:

"7795. (§4015.) *Court may order the investment of money of the ward.* The court on the application of a guardian or any person interested in the estate of any ward after such notice to persons interested therein as the court or judge shall direct, may authorize and require the guardian to invest the proceeds of sales, and any other of his wards money in his hands in real estate, or in any other manner most to the interest of all concerned therein, and the court or judge may make such other orders and give such directions as are needful for the management, investment and disposition of the estate and effects as circumstances require."

The provision of the statute is that the court or judge may authorize the guardian to "invest" the money in his hands. Loaning to the guardian himself cannot be considered an investment. The borrowing of the money by the guardian could not be lawfully authorized, without express and positive provision of law permitting that to be done. It is worthy of notice that no such statute is known to exist. This question is very well discussed and thoroughly considered in

Fidelity & Deposit Co. v. Freud, 80 Atl. 603;
(Md.)

It is held in this case that to allow the guardian to borrow does not constitute an investment, and his retaining the money in his possession and using it himself, is not investing it.

Under such an order, the guardian would be both debtor and creditor. This is clearly, in conflict with the rule that no man should be allowed to have an interest against his duty. It is contrary to all principles that relate to trusts and trust funds.

Second Pomeroy's Equity Jurisprudence, Sec. 1077.

Perry on Trusts, Secs. 461-464.

Hutson v. Jenson, 85 N. W. 689; (Wis.)

A void order is of course, no protection to anyone. If the order be treated as merely voidable or as having been obtained through imposition on the court or fraud, it should not be deemed to be a protection.

Where the guardian assumes a position antagonistic to his duty, he cannot, in that respect, act for the ward. When John M. Smith asked for leave to borrow the money he was acting in his own right, and not as guardian. He was asking an application in his own personal behalf. It would be against all logic and all reason to say that he could make such an application as guardian. He could not represent both parties or both interests, and we submit that no valid order could be made unless the wards were properly represented, and they could only be represented through a guardian of some sort acting in their behalf, even if such an order could be made at all.

The second and third points sought to be made by the defendant have to do with the question of the regularity and the validity of the order.

If the notice of application for such an order is jurisdictional, it can certainly be inquired into. It may be, that upon a collateral attack even this order, though made by a court

sitting in probate, would be deemed valid but that is beside the mark. The question does not arise here incidentally, as it arose in the former case. This is a direct attack upon it, just as much as if the suit were brought to set aside a judgment because there had been no service of summons. As to the nature of this action, in so far as it attacks the order of December 11th, 1900, we may accept as correct the definition or distinction made between direct and collateral attack in the case of

Burke v. Inter-State S. & L. Assn., 25 Mont. 315, 321.

In that case, it is said that:

“By ‘collateral attack,’ as the expression is used in this opinion, is meant every proceeding in which the integrity of a judgment is challenged, except those made in the action wherein the judgment is rendered or by appeal, and except suits brought to obtain decrees declaring judgment to be void *ab initio*.”

In so far as this suit seeks to have the judgment declared void *ab initio* for lack of power of the court, or for lack of a notice deemed essential, it is a direct attack. In so far as it seeks to set the order aside on the ground of fraud, it may be a collateral attack, but the right to make such an attack, if the facts warrant it, is conceded. We may cite *Thompson vs. Whitman*, 18 Wall. 457. The subject is also discussed in *Hauswirth vs. Sullivan*, 6 Mont. 203. This case was overruled in *Burke vs. Interstate*, *supra*, as to the effect of service on Sunday, but it is still instructive as to the question which now concerns us.

In *Re Schandoney's Estate*, 65 Pac. 877, is not an authority for the proposition that a notice is not essential because as will be seen by an inspection of that decision, the court did

not, really, hold that a notice was not necessary, although it did say that there was no duty resting upon the guardian to give notice, unless directed to do so by the court. That is not saying that no notice need be given. The court upheld the order in that case by indulging in the presumption that notice had been given but no presumption can arise in this case, because the fact is established, as above stated, that no notice was given, neither did that case involve a borrowing by the guardian.

Regarding the decision in *Re Schandoney*, it may be said that, while it refers to *Freeman on Judgments*, paragraph 124, it overlooks *Freeman on Judgments*, Section 319-b which we have cited and noted above. The latter section deals specifically with probate proceedings.

We submit that if the guardian were, by law, allowed to borrow, such an order could not be made without due notice to the ward, and without the latter being lawfully represented. To hold otherwise, would be to hold that a ward could be deprived of his property without the due process of law. If the court had authority to make such an order, in any case, it would follow that the official bond of the guardian would not apply to such a transaction. The sureties on the bond would not be liable for John M. Smith, as borrower. This is the only view consistent with reason and authority. The law entitles a ward to an official bond.

We submit that under the authorities quoted in this section, as well as under the decisions of the Supreme Court of Montana referred to above, namely, *In Re Tuohy's Estate* and *State vs. District Court*, that this order must be deemed to have been made without authority.

IV

STATUTE OF LIMITATIONS.

The statute of limitations had not run against this action.

Section 6460, quoted by appellant on page 41 of brief, has no application at all to this suit. It has been declared and held to be intended to extend the time within which an action may be brought, but not to shorten it.

Smith v. Hall, 19 Cal. 85.

This decision was made in 1861, prior to the adoption of this section in Montana. (This decision is not to be confounded with Quivey v. Hall, 19 Cal. 98.)

Lowell v. Kier, 50 Cal. 646.

In McMillan v. Hayward, 94 Cal. 257; 29 Pac. 774,

it is said:

“The evident purpose of section 353 is to secure to a party who has a cause of action against a decedent one year after the appointment of a legal representative within which to bring his action. This may or may not have the effect of extending the time. If it be necessary, in order that such person shall have one year after the appointment of a legal representative, then suit may be brought after the expiration of the general limitation; otherwise this section does not have, nor was it intended it should have, any effect whatever upon his rights. Such construction does not shorten his time, as limited by the general statute. It simply leaves him to that statute, because it was not necessary to extend the time in order to give him his year.”

McMillan v. Hayward was referred to in

Whiteside v. Catching, 19 Mont. 394,

cited by defendant.

We do not have to rely upon that section, and, on the other hand, it cannot be invoked against us, because, under the pro-

visions of the statute of limitations, our action is not barred, as will be seen. Section 6461, (quoted by appellant on page 41) when applicable, as it is here, excludes Section 6460, because the former adds one year after the issuance of letters besides the time between the death and issuance.

The statute did not begin to run until the discovery of the fraud, and, in no event, could it begin to run before the date of the settlement of the final account. It is the final account that we are attacking and that we must attack, and that we are seeking to re-open. The final account covers the whole period of guardianship and purports to be complete in itself. The reopening of that, under the authorities, allows re-examination of the whole account from the beginning. That action did not accrue upon the date of the majority of the complainant, but upon the date of the settlement of the account. In truth, it is only from the date of the discovery of the fraud that the statute began to run.

But, whether we take the date of the settlement of the account or of the discovery, not more than six months of the statutory period had run, because of John M. Smith's absences from the state. The stipulation establishes conclusively that, at the time of his death, John M. Smith had been in the State of Montana only six months after the settlement of his final account. Therefore, at the time of his death, taking the shortest period, namely, that of two years, the statute still had eighteen months to run.

Now, as to Mrs. Smith's absences. The time between the death of John M. Smith and the issuance of letters is not to be considered, and is excluded.

Whiteside v. Catching, 19 Mont. 394,
Code Section 6461 (referred to below.)

It appears from the pleadings that the defendant herein was appointed executrix on the 7th day of November, 1908. The date of the issuance of the letters testamentary does not appear. It must have been later. That would be still better for us. But we will take the date which does appear, viz., the date of the appointment. From that date to the date of the commencement of this action, the defendant was in this state only fifteen months in all. That would make only twenty-one months, viz., fifteen months for her and six months for John M. Smith during which the statute would have been running. If we went back to the date of the majority of complainant October 10, 1906, there would still be less than two years.

But from the foregoing computation, five months should be deducted. Section 6461 of the Revised Statutes provides:

“6461. (§544.) WHERE PERSON DIES OUT OF STATE.—If a person against whom a cause of action exists, dies, without the state, the time which elapses between his death, and the expiration of one year, after the issuing, within the state, of letters testamentary or letters of administration, is not a part of the time limited for the commencement of an action therefor, against his executor or administrator.”

John M. Smith died on October 6th, 1908, in Battle Creek, Michigan. His death having occurred out of the state, the year following the date of the letters testamentary, is not a part of the time limited for the commencement of the action, any more than the time between his death and the issuance of the letters. During that year the statute was interrupted. Therefore, the statute did not begin to run again until No-

vember 8th, 1909. During these twelve months the defendant had been in the state five months, and all prior to November, 1909. Therefore, these five months should be deducted. That would leave only ten months for Mrs. Smith and only sixteen months in all from the settlement of the account.

There would be still less time if we figured from the date of the discovery of the fraud. It is, therefore, evident that the statute could not possibly have run.

Defendant denies that Section 6458 of the Revised Codes providing that the time of the absence from the State of a person against whom a cause of action accrues is not part of the time limited for the commencement of the action, applies to the executrix. They cite no cases in point, but rely upon general principles. We submit that their conclusion is clearly wrong. It is conceded that the absences of John M. Smith are to be deducted. Why should the rule be different as to his representative? Logically, if defendant's contention was sustained, it would follow that no cause of action accrues against an executor, and if no cause of action accrues against an executor, how can an executor be sued at all on claims arising in the life time of the deceased? The statute does not speak of "debtor," but of the "person" against whom.

When a cause of action thus arises, it is suspended by the death. It is revived against the executor or administrator upon the latter's appointment, (or possibly upon presentation of the claim. It is not material which). There has got to be an executor or administrator in order to be able to bring suit. Therefore, clearly, according to logic and good sense, the executor is the person against whom a cause of action accrues in

the sense of Section 6458. It seems quite clear indeed, that the person against whom an action may be brought is the person against whom the cause of action accrues, within the meaning of that Section.

This enactment is a reproduction of a very old statutory provision. It appears from a quotation made by defendant on page 37 from *Amy vs. City of Watertown*, 130 U. S. 326, that this provision goes back to the Statute of Anne, and as stated by the Supreme Court, was intended to remedy the difficulty arising from the absence of the defendant. It seems safe to conclude, that if there was any direct authority against our view, counsel would have found it.

In *Anthes, Executor vs. Anthes, Administrator*, 121 Pac. 553, 21 Idaho 305, the statute was applied in the manner we contend for.

Despite counsel's sweeping assertion to the contrary, the cases referred to by the court uphold its views.

In *Hayden v. Pierce*, 144 N. Y. 512, 39 N. E. 638, the exception of absence was applied even under the short statute applying to claims after presentation.

See also *Titus v. Poole*, 145 N. Y. 417, 425.

Smith v. Arnold, 1 Lea (Tenn.) 378, is directly in point; there were involved the very same question and a similar statute, as appears from the report itself.

Wilkinson v. Winne, 15 Minn. 159, is also in point. By reference to the compilation entitled "Statutes of Minnesota Revision 1866," page 452, it will be seen that section 15, referred to in the case, corresponded to our section 6458. In this Minnesota case, the debt fell due after the death of the

decendent, but that, in no manner, as we submit, detracts from the force of the decision. This Minnesota case is also in accord with the contention hereinbefore presented and with the California case of *Smith v. Hall* and other cases cited in the first part of this subdivision, to the effect that a provision similar to that appearing in our section 6460 was intended to lengthen and not to shorten the time within which an action could be brought. That was Minnesota section 18 appearing on said page 6452 of the statutes.

Jennings v. Brouder, 24 Tex. 192, is also a case in point.

This statute has nothing to do with the matter of the filing of the claim. It is not a question of whether a claim can be presented in the absence of the administrator. The question deals with time for commencement of an action, not the presentation of the claim. According to our view, it is really not material here whether the computation is from August, 1907, or from December, 1906. However, as defendant seeks to make some point about the presence of John M. Smith in the State in 1907, we may call attention to the fact that the pleadings in the case in the state court put in evidence by the defendant here, as a part of the judgment roll in that case, show that John M. Smith was at Battle Creek, Michigan, the famous sanitarium town, in September, 1907, and it was there that the notice of rescission, and the offer to return the purchase price of the stock was made to him by the plaintiff. This is alleged in the complaint in that case, in paragraph X, which appears on page 81 of the transcript in this case, and the allegations of paragraph X are admitted by the answer in paragraph VII of the latter, on page 89 of said transcript. This bears out

the statement of the plaintiff while on the stand in this case, that the information which he received from his sister was imparted to him in August, 1907, although his memory was rather uncertain about the exact time. Here we see that John M. Smith was actually absent from the State in September, and therefore a portion at least of the eight months during which he was absent from the state in 1907 occurred after the discovery of the fraud by the plaintiff. If necessary, we could supplement the evidence regarding the absence of John M. Smith. If, instead of the two years, it is the five year limitation which applies, the action would not be barred, even according to the defendant's view of the meaning of section 6468. From November, 1909, the date of the appointment, to May, 1913, would be less than four years; adding six months for the time John M. Smith was in the state we have just about four years which could be computed.

There is nothing in the law and nothing in reason to require a creditor to assume the burden and expense of prosecuting proceedings for the removal of an administrator or executor. And, suppose a creditor did petition for the removal of the executor, would not the time continue to run against his claim, if it ran, at all, during the absence of the executor? And the time might run out while he was prosecuting this proceeding.

This is not a case where service by publication is authorized. Even if service by publication could be had, it would still remain true that under such a statute as ours, the running of the time would be interrupted by absence.

Anthes v. Anthes, 121 Pac. 553; 21 Ida. 305, already cited.

Lane v. National Bank, 6 Kan. 74.

Chicago K. & N. Ry. Co. v. Cook, 43 Kan. 83;
22 Pac. 988.

Conlon v. Lanphear, 15 Pac. 600; 37 Kan. 431.

Hayden v. Pierce, *Supra*.

In the matter of actions on claims, no matter what the relations of the executor to the acknowledged creditors and the heirs, he is the party to be sued. He has duties and obligations towards the creditors and heirs, but he is, none the less, the party against whom the suit must be brought.

Seculovich v. Morton, 101 Cal. 67; 36 Pac. 387, cannot be regarded as authority in this case. It is not authority in Montana. It was considered by the Supreme Court of Montana in the case of *Silver Camp Mining Co. v. Dickert*, 31 Mont. 488, 500, and was criticised. Moreover, it seems that laches rather than the statute of limitations were the decisive factor in *Seculovich v. Morton*. The case was one to declare and enforce a trust in real property. It appears from the decision that no demand was made for a conveyance for twenty-four years, and the decision reads:

“Irrespective of the question whether defendant’s absence from the state prevented the running of the statute of limitations, we think that judgment of the court below was right, because the plaintiff did not make a demand within a reasonable time. Failing to do so his action became barred by his laches. True, it is a general rule that the statute does not run against an express trust where there is concealed fraud; but when the injured party has been guilty of great laches in the prosecution of his remedy he will be barred in equity, on account of the paramount importance of having title settled.”

From this we feel justified in saying that the case was decided upon laches and not upon the statute of limitations.

V.

STATUTE OF NON-CLAIM.

We must note at the outset of the discussion of this point that counsel are in error regarding the history of the legislation in California and in Montana. We should note, also, that the history given in Kerr's Annotated Code is not explicit regarding the time of the adoption in California of the provision relating to claims upon contracts. Indeed, Kerr's historical note may be misleading. It might give the impression that Section 1493 in its present form, and insofar as it relates to claims upon contracts, is merely a re-enactment of the Code of 1872, whereas we will see that it was an amendment of 1874, that modified this section so as to make it relate to claims on contracts.

It is desirable to establish definitely the time when Section 1493 of the California Codes was put into its present form and when the corresponding provision was enacted in Montana, so that the relevancy and application of decisions referred to may be determined with certainty. It was not until 1874 that this specific provision was enacted in California, and it was not until 1877 that anything like it was adopted in Montana.

The history of the California Legislation is as follows:

The provision barring claims not presented within the time specified in the notice or fixed by the statute was originally found in Section 130 of the Probate Practice Act of California. The original Section did not contain any reference to claims on contracts. Some amendments were made to it in 1860, and as thus amended, it read as follows:

Section 130: "If a claim be not presented within ten months after the first publication of the notice, it shall be barred forever; Provided, that if it is not then due, or if it be contingent, it may be presented within ten months after it shall become due, or absolute; and provided further that when it shall be made to appear by the affidavit of the claimant to the satisfaction of the executor or administrator and the probate judge, that the claimant had no notice, as provided in this act, by reason of being out of the state, it may be presented any time before the decree of distribution is entered."

(California Statutes of 1860, page 17.)

This was the form of the section in question at the time when *Lathrop vs. Bampton*, cited by plaintiff, was decided, namely, in 1866, and the decision itself refers to this section 130.

Section 130 of the Probate Act became Section 1493 of the Code of Civil Procedure of California in 1872. The section as re-enacted in the Code of 1872 differed somewhat in the wording, but insofar as the material parts are concerned, the provisions of the code were similar to that of the Probate Act.

In March, 1874, Section 1493 of the California Code was amended, and as so amended, it read as follows, insofar as it is material here:

Section 1493: "If a claim arising upon a contract heretofore made, be not presented within the time limited in the notice, it is barred forever, except as follows: If it be not then due * * *. All claims arising upon contracts hereafter made, whether the same be due, not due, or contingent, must be presented within the time limited in the notice; and any claim not so presented, is barred forever; provided, however * * *"

(Amendments 1873-4, page 364, took effect July 1, 1874.)

In this form the section was adopted as a part of the Probate Practice Act of Montana, enacted February 16, 1877,

and appears therein as Section 150. (Laws of Montana 1877; also note on page 286 of the Revised Statutes of Montana of 1879 and on page 400 of the Compiled Statutes of Montana of 1887.)

Prior to February, 1877, the Statutes of Montana were so very much different that there was no similarity between them and the California Statutes or the old California Probate Act. The provisions existing prior to that time will be found in the codified statutes of Montana of 1871-2 on pages 349, et seq. Under the old law, no notice to creditors was required, and actions might be commenced without the presentation or "exhibiting" of a claim to the executor, the commencement of the suit being deemed an exhibition of the claim, although there was a time limit.

So far as Montana is concerned, the Probate Practice Act of February, 1877, was new legislation. This Act practically adopted those parts of the California Code of Civil Procedure relating to estates.

The California Section 1493 was again amended in 1880. The effect of the change was to shorten it and simplify it by doing away with the reference to contracts "heretofore made" and the contracts "hereafter made" and to deal with all claims upon contracts in one provision. As so amended, the material part reads as follows:

"Sec. 1493. All claims upon contracts, whether the same be due, not due, or contingent, must be presented within the time limited in the notice, and any claim not so presented is forever barred; provided, * * *"

In this last and definite form, this section was adopted in Montana by an Act approved March 7, 1895, with an addi-

tional proviso, however, relating to mortgages, and as thus enacted it became Section 2603 of the Code of Civil Procedure enacted in 1895. This Code followed closely the Code of Civil Procedure of California.

As stated in appellant's brief, the section is now designated as Section 7525 of the Revised Codes of Montana.

It will thus be seen that counsel are in error in stating that Section 1493 of the California Code was a substantial reenactment of the Act of 1860. Therefore, so far as we are concerned, the legislation embodied in this section dates in California from July, 1874, and in Montana from February, 1877. The differences made in the wording of the section since 1874 do not appear to be material. *As adopted in Montana, the section never related to any claims but claims on contracts, because the section did not have any previous existence, and in California the section was amended in 1874, so as to limit it to claims on contracts.*

As a result of the foregoing, we submit that California decisions made under the old law have no application, and that the only California decisions that would be relevant or in point would be those made under the law of 1874.

From March, 1874, down to February, 1877, there were no decisions rendered in California construing section 1493. We have found in the California reports between these dates only two cases dealing with claims against estates. These cannot be said to have any relevancy whatever. The first is the case of Whitmore vs. San Francisco Savings Union, 50 Cal. 145. In that case, it was held, that where a note had been given by a decedent with a trust deed to a third party to

secure it, the failure of the creditor to present a claim against the estate did not extinguish it nor affect the creditor's right to foreclose on the land affected by the deed of trust; so we need not consider that any further. The other case is that of the estate of Halleck, 49 Cal. 112. That was the case of a claim against an executor, of a deceased executor, on account of the latter's acts and omissions in the estate of which he was executor. It is held that the claim should have been presented to the estate, but the question of the time within which such claim should have been presented was not discussed at all for the very good reason that no presentation at all had been made. The section of the statute is not even referred to.

We therefore maintain that there had been no construction of this statute in California at the time of its adoption in Montana; and it cannot be said that any California decision is binding in Montana. In order to have that effect, the decision construing the section in question should have been rendered prior to February 16, 1877.

We can go further, and say, that from 1874 to 1895 there was no decision in California construing section 1493 as amended in 1874, that is, in the form of which we find it in the Probate Practice Act of Montana of 1877, or in the Code of Civil Procedure of Montana of 1895. We have been unable to find any such decision and none is cited.

So we feel justified in saying positively that the provision as it now stands, was not construed by the California Code prior to its adoption here.

Gillespie vs. Winne cited by appellant was decided in 1884. All that is pertinent to the present inquiry is quoted in appel-

lant's brief. It will be seen from the quotation, as well as by reference to the opinion itself, that while it is held that the claim therein questioned should have been presented, the question of the time within which it should have been presented was not discussed, so that the question we are considering was not discussed there, and the section was not referred to in the opinion.

In the case at bar a claim was presented. Therefore, decisions made in cases where no claim at all had been presented at any time are not applicable. In order to make good her point, the appellant must show that this claim was barred, unless it was presented within ten months. There is no provision barring claims not presented within ten months or other period mentioned in the notice to creditors or restricting the presentation of claims to such a period of time, except section 7525, and that section only applies to claims upon contracts. It does not apply to all claims or to such a claim as is presented here.

There is another provision of the Code under which it might be contended that all claims of any nature must be presented before a suit could be maintained upon the claim, and that is section 7532, quoted by appellant, and which says that "No holder of any claims against an estate shall maintain any action thereon, unless the claim is first presented to the executor or administrator, except in the following case: * * *".

But that section does not require that the claim shall be presented within any fixed period. It would satisfy the requirements of that section if the claim were presented at any time, while the estate was pending, or at all events, before a decree of distribution was entered.

Referring now to California decisions, it is submitted that the case of *Lathrop v. Bampton* and other cases under the old law have no application. Neither have cases under the new law which deal with claims upon contracts, unless it can be shown that the claim involved in this suit is upon a contract.

Hardin v. Sinclair, 115 Cal. 460, 47 Pac. 363, holds that a claim on a tort need not be presented at all. This is accepted by Mr. Church as a correct rule. He says in *Probate Law and Practice*, page 735:

"As the statute which relates to the presentation of claims against estate before actions can be maintained at all, relates to claims arising on contracts, other actions do not come within the rule. Thus no presentation of a claim is necessary before the bringing of an action to recover damages for wrongful acts."

This view is, also, accepted and applied in

American Trust Co. v. Chitty, (Okla.) 129 Pac. 51.
"Followed in *Leverone v. Weakly*, 155 Cal. 401"

McGrath v. Carroll, 110 Cal. 79; 42 Pac. 466, was a case upon an alleged express trust. The plaintiff in that case alleged, according to the report, "that the moneys were received and held by the deceased, in trust for the use and benefit of plaintiff, but the nature and terms of the trust are not, however, disclosed".

It is evident that on such an allegation, the only trust that could be assumed to exist was a trust arising from a contract, that is to say, a trust of a contractual nature.

Grubb v. Chase, 158 Cal. 352, 111 Pac. 90, also cited by appellant, held that a suit upon a claim against an estate must correspond to the claim presented. The evidence in that case showed that while the claim alleged was for goods, wares,

etc., sold and delivered, the action should have been for fraud. The lower court whose opinion is quoted in the decision we are now considering, held that the claim proved was entirely dissimilar from that alleged, and, therefore, that the plaintiff could not recover. The decision in upholding that view goes beyond it, and says that an action on such a claim, that is to say on the fraud, would have to be presented according to law, and cites *McGrath v. Carroll*, but nothing is said about *Hardin v. Sin Claire*. It is submitted that even as to the necessity of presentation, the California decisions cannot be said to leave the matter in a satisfactory condition. Anyhow it will be noticed that in *Grubb v. Chase* there had been no presentation at all of the claim founded upon fraud. So this was, also, a case involving not the question of the time within which a claim should be filed, but a case where no presentation at all had been had, and, therefore, a case involving merely the question of the necessity generally of presenting a claim. The case does not touch the question we are discussing here. It will, therefore, be seen that the question now under discussion has never been passed upon or considered in California, and that as to whether a claim not arising upon contract must be presented, there is conflict with the California decisions.

Montana Cases.

In *Higgins Estate*, 15 Mont. 474 (decided in March, 1895), Judge Hunt delivering the decision, says on page 487-8, with reference to claims against estates:

“The creditor cannot maintain his suit, under section 157, against an estate, unless he has presented the claim to the executor. And, by section 150, if the claim be one

arising upon a contract, unless presented within the time limited in the notice, it is barred forever, except under particular conditions."

The references are to the Probate Practice Act, adopted as stated above in February, 1877, and reproduced in the Compiled Laws of 1887. It is evident from this quotation that the Supreme Court of Montana at that time understood these sections to mean exactly what we are contending for here. No other Montana case has dealt with this question.

Melton v. Martin, 28 Mont. 150, cited in appellant's brief as "Melton v. Jones," was, according to the opinion, a case for money had and received. A presentation of the claim was made, but after the expiration of ten months. The contention was not that the claim was presented in time, or that it was not covered by section 2603 of the Code of 1895, viz., section 7525 of the Revised Codes. The contention was that the delay in the presentation of the claim was excused because, as asserted at the trial, the money had been paid by mistake, and the mistake had not been discovered until after the expiration of the ten months period. It was evidently taken for granted by everybody that the case fell within the provisions of section 7525, viz., section 2603 of the old code, unless it could be regarded as a suit in equity to follow a trust fund. There was no discussion of the question of whether or not claims not on contract had to be presented within the ten months. The claim was evidently treated by the court as a claim arising upon contract, so that when the court said, "Under Section 2603, Code of Civil Procedure, all claims must be presented within the time limited in the notice or they are barred forever, except in cases * * *", the court meant nothing more than

that claims covered by that section were to be so presented; and the general expression cannot, reasonably, be made to apply to cases not similar and to questions not before the court. In speaking about the attempted excuse for non-compliance, the court said:

“We are not satisfied from the pleadings and statement of facts that a mistake ever existed, and, if it did, that plaintiff should not have discovered its existence within the time limited in the notice by the exercise of reasonable diligence.”

That was the only point sought to be made in the case to show that the presentation after the expiration of the ten months was insufficient. Another contention in that case was that the deceased held the money as a trust fund, and, therefore, it was not necessary to present the claim at all. In disposing of that contention, the opinion said:

“But the pleadings are barren of any such suggestion, or of the further necessary suggestion that the identical money could be traced into the hands of defendant. Besides, this is not an action in equity to enforce a trust, but a suit at law to recover money ‘had and received,’ and the claim should have been presented to the administrator of the estate within ten months after the first publication of notice to creditors.”

It will be seen that no opinion is expressed as to whether presentation would have been necessary if the action had been one in equity to enforce a trust, but one might imply that if that had been the character of the suit, the court would have held that presentation was not necessary.

Melton v. Martin cannot be considered an authority applicable to the case at bar.

In Dorais v. Doll, 33 Mont. 314, the claim there in question was presented in time and no question arose regarding the

time of presentation or the character of the claims which must be presented. That was an action to recover "a balance alleged to be due upon a settlement between the parties for ice sold and delivered by plaintiff to defendants." Clearly, a case on contract. The only matter there discussed, under the probate provisions relating to claims, was the sufficiency of the affidavit and of the endorsement or rejection of the claim. The claim was presented at the office of the attorney of the administrator. As stated in the opinion on page 318, "The attorney, under the direction of the administrator, endorsed the claim 'Rejected,' and signed the administrator's name." The question of whether the presentation at the office of their attorney was proper was not discussed at all. Moreover, it appearing that the administrator gave directions to the attorney to endorse the claim "rejected" and to sign the administrator's name, it must be presumed that the administrator was present when that was done. So, the case is not even an authority upon the question of whether an administrator can require claims to be presented at a designated place, in his own absence.

This is not a claim upon a contract. There was no contract between the guardian and minors. The duties of the guardian are imposed by law. The rules of duty and the liabilities imposed upon the guardian arise under our Civil Code and the rules of equity. Some of these are similar to the rules applicable to trustees in express trusts, but a clear distinction still remains between an express trust and a trust like the one in question here. The obligations of a guardian arise by operation of law. The Civil Code, section 4893, provides:

"An obligation arises either from:

1. The contract of the parties; or,
2. The operation of law.

An obligation arising from operation of law may be enforced by civil action or proceeding, or in the manner provided by law.”

“4966. ESSENTIAL ELEMENTS OF CONTRACT.—It is essential to the existence of a contract that there should be:

1. Parties capable of contracting.
2. Their consent.
3. A lawful object; and
4. A sufficient cause or consideration.”

The complainant obtained his majority in October, 1906. The complainant was under fourteen years of age at the time that John M. Smith was appointed guardian, so the complainant did not have even the selection of the guardian; nor could there have been any contract between them. Complainant obtained his majority in October, 1906, as stated in appellant’s brief. The guardian was appointed in March, 1899.

Lathrop v. Bampton has nothing to do with the question of whether a claim, such as is asserted here, is one on contract or not. That case does hold that where trust property has lost its identity and cannot be clearly or specifically traced and followed, the claim becomes one for the recovery of money only. That is quite true. [The same may be said of other cases cited.

In Ellison v. Moses, also cited by appellant, Lathrop v. Bampton is quoted as authority in favor of the principles just above stated, viz, that when the identical property cannot be identified or the funds followed, that the claim becomes merely a money demand without any lien or preference or rights other

than those of a general creditor, and in saying that "the trustee's personal liability to make compensation for the loss occasioned by breach of trust is a simple contract equitable debt," the court was considering and determining whether such a claim was one entitled to any preference, and decided that it was not, and that there was no equitable lien.

Pomeroy in the paragraph quoted by appellant, viz, 1080, deals with express trusts. (It will be noted that what the author calls sections are not the paragraphs designated by numbers but the divisions designated by Roman numerals.) Express trusts are dealt with in section VI., the other trusts in section V. In paragraph No. 1059, the author says:

"The duties and liabilities of the trustees and corresponding rights of the beneficiaries in trusts arising by operation of law have been explained in the preceding section. The discussions of the present section refer primarily and mainly to the powers, duties, and liabilities of the trustees in express trusts of all kinds and for all purposes, and the statement of their duties and liabilities necessarily includes the correlative rights and remedies of the cestuis que trustent; some of the conclusions may, however, apply to the trustees in resulting and constructive trusts. The entire subject embraces the following subdivisions: 1. The trustee's powers and modes of action; 2. His duties and liabilities; 3. His compensation and allowances; 4. Removal and appointment of trustees." (Italics ours.)

Conversion or appropriation of funds to his own use by a guardian is a tortious act.

It will be evident upon a moment's reflection that cases dealing with the question of whether a claim arising upon a breach of trust is endowed with any greater rights than those of a general creditor, or cases distinguishing between "simple contract debts" and "specialty debts," are not determinative

of the question at issue here. Evidently, too, there are trusts and trusts. According to Pomeroy, paragraph 1079, the expression "breach of trust" may be applied to the action of persons who "intermeddle with trust property," as well as to persons regularly appointed trustees, yet one who becomes a trustee involuntarily and by operation of law, as, for instance, a person "to whom property is transferred in violation of a trust" has not made any contract. Where it becomes essential to decide whether a particular relation was a contractual one or not or a liability is one, properly so-called, arising upon contract, general expressions must be carefully limited.

Here the action is one to re-open the guardian's account for fraud, actual and constructive, and to surcharge him with interest because of his misfeasance and non-feasance. The liability for interest, either simple or compound, surely is not one arising on a contract. It is imposed by law.

In a case of this kind, where the liability is so clear, courts will not strain a point to protect the wrong-doer.

This is not a suit on the guardian's bond. Even if by any fiction of law, the complainant at any time might have been allowed to recover as upon an implied contract, or if by some such fiction, the guardian might have been held liable as upon an implied contract, it is submitted that in reality there was not, and is not, any contract, and that neither he nor his successors can seek to avoid liability by resorting to any fiction of law. These fictions were indulged in for the protection of the creditor and not for the protection of the debtor or the wrong-doer.

Our Civil Code classifies trusts as follows:

"5364. TRUSTS CLASSIFIED.—A trust is either:

1. Voluntary; or,
2. Involuntary."

"5365. VOLUNTARY TRUST, WHAT.—A voluntary trust is an obligation arising out of a personal confidence reposed in and voluntarily accepted by one for the benefit of another."

"5366. INVOLUNTARY TRUST, WHAT.—An Involuntary trust is one which is created by operation of law."

"5370. VOLUNTARY TRUST, HOW CREATED AS TO TRUSTOR.—Subject to the provisions of §4537 (1311), a voluntary trust is created, as to the trustor and beneficiary, by any words or acts of the trustor, indicating with reasonable certainty:

1. An intention on the part of the trustor to create a trust; and,
2. The subject, purpose, and beneficiary of the trust."

"5378. INVOLUNTARY TRUSTEE, WHO IS.—One who wrongfully detains a thing is an involuntary trustee thereof, for the benefit of the owner."

"5373. INVOLUNTARY TRUST, RESULTING FROM FRAUD, ETC.—One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other or better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it."

Civil Code, section 3787, provides that "the relation of a guardian and ward is confidential, and is subject to the provisions of the title on trusts."

The guardian is subject to these provisions, but he is not called "trustee."

On principle, it is demonstrable that the claim is one in tort. In the Law of Torts by Burdick, we find:

"THE DISTINCTION BETWEEN A TORT AND A BREACH OF CONTRACT is broad and clear in theory. In practice, however, it is not always easy to determine whether a particular act or course of conduct subjects the wrongdoer to an action in tort, or merely to one for a breach of contract. The test to be applied is the nature of the right which has been invaded. If this right was created by the agreement of the parties, the plaintiff is limited to an action *ex contractu*. If it was created by law he may sue in tort. A few cases in addition to those cited in the last note will illustrate the difficulty experienced by lawyers in applying this test." (Page 14).

In Rapalje & Lawrence's Law Dictionary under "Breach of Trust" we find, paragraph 2:

"REMEDY FOR.—A breach of trust is in the nature of a tort, and entitles the *cestui que trust* who has been injured to compel the trustee to make good the loss caused by it. There is even something penal in the relief given in some cases of breach of trust: thus, where a trustee has employed trust funds in his own business, and has thereby made a profit, the *cestui que trust* is entitled to it, although the trust estate has not been injured. (Lew. Trusts 742; Wats. Comp. Eq. 885.) As to accounts with rests directed against trustsees, see Account, §§ 12, 14."

Cooley in his work on Torts includes "Wrongs in Confidential Relations," and under that head he deals with liabilities of trustees, executors, guardians, etc. (2nd Ed., sections 523-525.)

VI.

f the Statute of non-claim or the statute of limitations were applicable, the court, in order to do justice, could and should disregard it, and relieve the complainant.

Newberry v. Wilkinson, 199 Fed. 673.

Under the decision of the court in that case, we submit that

the complainant would be entitled to relief, despite the statute of non-claim and the statute of limitations. Neither the statute of non-claim nor the statute of limitations should be allowed to stand in the way of justice. It is made plain in that decision that although the statute of non-claim and the statute of limitations will usually be applied, yet, for equitable considerations the court may suspend or bar their application, and in the last paragraph of the opinion it is stated that if that suit had been seasonably instituted after the plaintiff therein had become of age, the bar of the statute of non-claim would not have stood in the way of his recovery.

Here the complainant seasonably and promptly brought a suit, which, according to the decision of this court in *Smith v. Moore*, he was entitled to maintain. Upon the death of his former guardian, the action was continued against and litigated with the executrix. After the adverse decision in the state court he seasonably re-presented the claim now sued upon and brought his suit. He surely was diligent and did the best he could. The claim in itself is eminently just. The case is one which appeals most strongly to a court of equity.

VII LACHES.

The complainant has not been guilty of any laches. He brought suit very promptly after the discovery of the fraud. If he had been in a position to bring his suit in the United States Court, like his sisters, he would have recovered the original property. While it is true that the State Court decided against him, it is also true that the decision of the court in *Moore v. Smith* affords ample justification for the bringing of the suit

to rescind. There was, therefore, no neglect on his part. He was doing his best.

"Brown vs..Fletcher, 182 Fed.,,965".

VIII.

ELECTION OF REMEDIES

Regarding this point all that seems necessary for us to say is that the point sought to be made in appellants brief is wholly inconsistent.

Counsel fail to distinguish between the nature, as well as to the consequences of affirmance and disaffirmance. If a party affirms, with a full knowledge, he may not, as a general rule, afterwards disaffirm; but if he seeks to disaffirm and fails, the transaction remains intact and his rights by virtue of the transaction remain unimpaired. For instance, suppose a vendor to whom money is due, as a part of the consideration of a sale, seeks to disaffirm the sale on the ground of fraud, but fails, does he lose his right to recover the balance due him? Evidently not. The statement in defendant's brief of the nature of the remedies available to the plaintiff is decidedly erroneous. It is said therein, page 41 :

"In other words, the plaintiff had two remedies available to him either to affirm the sale and demand judgment for his share of the proceeds thereof, or to set aside the sale and demand his share of the stock of the estate of William Smith, and all dividends paid thereon, and the profits flowing therefrom which came into the hands of John M. Smith."

The plaintiff did not have a right on any occasion to demand judgment for his share of the proceeds of the sale, if he affirmed the sale. If the sale was affirmed, either by him or by judgment, it necessarily followed that the proceeds of the sale had been paid over to his guardian. His remedy, other

than setting aside the sale, was to proceed against his guardian because of the latter's use of the moneys received by him. That would impliedly, in a case of this kind, affirm the sale; but proceeding against the guardian for the use of moneys received by him, is quite a different thing from demanding judgment for the price or proceeds of the sale. Evidently the latter could only be demanded from the *vendee*, as such, or somebody who would owe for the price. When received by the guardian, the proceeds became, simply, guardianship funds. The source whence the funds came is not material in a proceeding against the guardian for their use.

Appellant might as well contend that if the guardian had withheld part of the moneys admitted to be due, the defendant would have lost his right thereto by bringing his other suit.

IX.

THE FORM OF THE DECREE.

Counsel criticise the form of the decree. They must have overlooked the last paragraph thereof wherein it is decreed that the "estate of John M. Smith, Deceased, and said Mary M. Smith, as Executrix of the Estate of John M. Smith, defendant, pay in due course of administration the amounts hereinbefore specified and found due to the complainant."

In conclusion, we respectfully submit that the reasoning of the court below in support of its decision is unanswerable and that the decree ought to be affirmed.

T. J. WALSH,

C. B. NOLAN,

WM. SCALLON,

T. J. HOOLAN,

Of Counsel for Appellee.

NO.

2418

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

MARY M. SMITH, as Executrix,

Appellant,

vs.

WILLIAM SMITH,

Appellee.

MOTION AND SUPPLEMENT TO BRIEF.

T. J. WALSH,
C. B. NOLAN,
WM. SCALLON,
T. J. HOOLAN,
Of Counsel for Appellee.

Filed

1914

2011/10/10/1001

MARY M. SMITH, as Executrix,
Appellant,
vs.
WILLIAM SMITH,
Appellee.

Now comes the appellee and respectfully moves this court to be allowed to file the following supplement to his brief in the above entitled cause. *JIT Mohan vs. Mohan*

in which it is held "a judgment by default entered too soon is as much a nullity as if it had been taken on a defective service."

The citations were overlooked in preparing the brief and are submitted for the purpose of showing what the established rule of Montana is regarding the point in question. The validity of the order of discharge is discussed in appellee's brief on pages six to nine. It will be recalled that there was no appearance of the appellee at the time that the order of discharge was made, and that no notice of any application therefor had been given to him. Whatever may be the rule elsewhere, the cases above cited establish the rule for Montana, that a judgment of a state court, by default, is void if prematurely entered. The analogy is evident.

T. J. WALSH,
C. B. NOLAN,
WM. SCALLON,
T. J. HOOLAN.
Of Counsel for Appellee.

NO. 2448

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

MARY M. SMITH, as Executrix,

Appellant,

vs.

WILLIAM SMITH,

Appellee.

SUPPLEMENT TO BRIEF.

T. J. WALSH,

C. B. NOLAN,

WM. SCALLON,

T. J. HOOLAN,

Of Counsel for Appellee.

Filed

JAN - 4 1915

F. D. Monckton,

Clerk.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

MARY M. SMITH, as Executrix,

Appellant,

vs.

WILLIAM SMITH,

Appellee.

SUPPLEMENT TO BRIEF.

Now comes the above named appellee and respectively moves the Court for leave to add to his brief in the above entitled cause on page 48 at the end of Sub-division "V" the following citation, to-wit:

Schaeffer v. Miller, 41 Mont. 417; 109 Pac. 970.

This citation is desired to be made in connection with the discussion of the statute of non-claim, and, particularly, of the question of whether or not the obligation or liability in the complaint is one arising upon contract.

T. J. WALSH,

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